Supreme Court, U.S.
FILED
94 759 SEP 27 1994
OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

RICHARD E. JOB,
Petitioner,
VS.
WELLS FARGO NATIONAL BANK, N.A.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD E. JOB
Petitioner *in Propria Persona*
3359 Pomona Boulevard
Pomona, California 91768
(818) 964-2311

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

APPENDIX "A"

BEST AVAILABLE COPY

Fifth Appellate District No. F015671/F016439

S040059

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

Richard E. Job, Appellant-Supreme Court

FILED Jun 29, 1994
ROBERT WAMBRAK
Clerk - Deputy

v.

Wells Fargo Bank, Respondent

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX "B"

BEST AVAILABLE COPY

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
APR 14, 1994
KEVIN A. SWANSON, Clerk
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD E. JOB, Plaintiff, Cross-defendant and Appellant, vs. WELLS FARGO BANK, Defendant, Cross-complainant and Respondent.	F015671 and F016439 (Super. Ct. No. 303131-7)
RICHARD E. JOB, Petitioner, vs. THE SUPERIOR COURT OF FRESNO COUNTY, Respondent; WELLS FARGO BANK Real Party in Interest.	F015748 O P I N I O N

APPEAL from a judgment of the Superior Court of Fresno County.

ORIGINAL PROCEEDING; petition for writ of mandate. Lawrence J. O'Neill and Thomas P. Breen (assigned by the Chairperson of the Judicial Council), Judges. *[1]

Albertini & Gill and Eugene J. Albertini for Plaintiff, Cross-Defendant, Appellant and Petitioner.

Brobeck, Phleger & Harrison, David J. Brown, Kelly C. Wooster, Judy L. Paraventi and Kenneth Andreen for Defendant, Cross-Complainant, Respondent, and Real Party in Interest.

No appearance for respondents, the Superior Court of Fresno County.

--o0o--

Richard E. Job, plaintiff, cross-

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1 * Judge O'Neill was the trial judge; Judge Breen reviewed the denial of petitioner's motion to disqualify the trial judge.

defendant, appellant and petitioner, signed a continuing guaranty for a credit line issued to J/W Cattle Corporation by Wells Fargo Bank, defendant, cross-complainant, respondent and real party in interest. Job sued Wells Fargo for negligence, breach of the covenant of good faith and fair dealing, breach of the credit agreement, breach of fiduciary duty, and for declaratory relief. Wells Fargo cross-complained seeking to enforce the guaranty and to collect on another note signed by Job. Judgment was entered for Wells Fargo for $2,980.166.03. In a separate proceeding, the trial court awarded Wells Fargo $1,187,841.86 in costs and attorneys fees.

This consolidated action on appeal concerns three separate areas. First, Job petitions for writ of mandate challenging the denial of the motion to

disqualify the trial judge. The second portion involves Job's challenges to the trial court's rulings. The third phase of this appeal is Job's challenge to the award of costs and attorneys fees. We affirm.

FACTS AND PROCEEDINGS

Job, a cement contractor for over 35 years, formed a business with Jay Williams, his son-in-law, to run a cattle stocker and feeder operation. They incorporate, calling the business J/W Cattle Corporation (hereafter J/W). Williams and Job were the stockholders and officers of the corporation. Williams had experience in the cattle business, but Job did not know anything about the cattle business, when he met Williams.

After an unsuccessful banking relationships with Wells Fargo in Santa

Ana and Bank of America in Fresno, Job sought out Wells Fargo in Fresno to provide a credit line to the corporation. Williams and Job provided information on their proposed venture to Wells Fargo. Gary R. Shaffer was in charge of setting up the loan at Wells Fargo in Fresno. One item of financial information listed 2,003 head of cattle serving as security for a loan Bank of America made to J/W. When Shaffer checked with Bank of America regarding the 2,003 head of cattle, he was informed by Tom Rogers at Bank of America that there were approximately 1,362 head of cattle, not 2,003. Job was not informed of this discrepancy and believed that there were 2,003 head of cattle when the notes and continuing guaranty were signed.

Tom Sample, a field representative for Wells Fargo, reviewed the documents

submitted by Williams and Job and thought the venture was a viable one. Shaffer recommended granting a $3.3 million credit line to J/W. His boss, Roger Sturdevant, concurred. The granting of the line of credit was contingent upon the bank's obtaining transfer of the security agreement on the cattle, Job's personally guaranteeing the line of credit, and Job's pledging of a $500,000 certificate of deposit as loan security. Although Williams sought to have money from the credit line issued by way of check, Wells Fargo thought it would be more prudent for money to be disbursed in the form of drafts authorized by both Williams and Job as transactions occurred.

On October 28, 1982, Wells Fargo entered into a written credit agreement with J/W. Job signed the continuing

guaranty for J/W's indebtedness up to $4 million, and also pledged a $500,000 time certificate of deposit as loan security.

The first transaction on this line of credit was the pay off of the Bank of America loan in the sum of $1,054,967.79. This allowed Wells Fargo to obtain the security agreement on the cattle.

After the credit line was in place, Shaffer would call Job for authorization after Williams would seek to have a draft issued. After a short period of time, Shaffer merely notified Job of the draft by a bank form, an MIS-16. Many of the drafts were signed by persons other than Job or Williams.

Job believed that Wells Fargo would inventory and appraise the cattle being purchased by J/W. Because of prior difficulty with Williams on previous loans, Job assured Wells Fargo he would

follow the account closely.

In July 1983, Job suspected a problem with the loan and the existence of a shortfall. Job discovered that Williams had defrauded Wells Fargo by presenting drafts for cattle purchases which were falsified transactions.

Job borrowed an additional $147,531.34 from Wells Fargo to provide feed for J/W's cattle. J/W had insufficient assets to repay the credit line loan to Wells Fargo. All remaining cattle were wold in January and February of 1984. Wells Fargo applied the proceeds from the sale of the cattle and the $500,000 certificate of deposit to the credit line loan balance. After this, the debt outstanding from J/W to Wells Fargo on the loan guaranteed by Job was $1,658,608.38.

On November 4, 1983, Job filed a

complaint against Wells Fargo alleging six causes of action. IN the first cause of action, Job alleged that Wells Fargo was negligent in honoring drafts which were signed by unauthorized persons. Job claimed in the second cause of action that Wells Fargo was negligent in honoring drafts not signed by both Job and Williams. The third cause of action alleged a breach of the covenant of good faith and fair dealing; this was based on Wells Fargo's purported failure to exercise reasonable care in honoring unauthorized withdrawals from J/W's credit line. The forth cause of action was for a breach of the credit agreement.[2] Job alleged Wells Fargo breached a fiduciary duty as his fifth

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2 Job does not challenge on appeal the trial court's granting of Wells Fargo's request for judgment on the pleading on this cause of action.

cause of action; according to Job, this duty was breached when Wells Fargo failed to require the proper signatures and to authorize drafts based on the sole oral authorization of Williams. Job's sixth cause of action was a request for declaratory relief; he claimed he should be exonerated based on Wells Fargo's failure to obtain his consent before each extension of credit.

On September 11, 1986, Wells Fargo filed a cross-complaint against Job and J/W.[3] Wells Fargo sought from Job $1,658,608.38 plus interest due by reason of the continuing guaranty. Wells Fargo also sought from Job $147,531.34 plus interest based on the promissory note executed by Job. Wells Fargo's final cause of action against Job was for negligent misrepresentation.

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3 J/W is not a party to this appeal.

Wells Fargo filed a motion for summary judgment, asserting that Job could not rely on a "two-signature requirement" because such a requirement was solely for Wells Fargo's benefit and Job waived the requirement.

Job filed opposition to the motion, claiming for the first time, beyond the two-signature requirement, Wells Fargo was negligent in approving, monitoring and supervising the J/W loan. Wells Fargo failed to follow its customary banking practices, contending Job, breaching the implied covenant of good faith and fair dealing. Job asserted that Wells Fargo could not hide behind the "two-signature requirement" to obfuscate the real issue of Wells Fargo's actions.

The trial court (Judge Thaxter) denied the summary judgment motion,

finding that the "two-signature requirement" was not a condition solely for Wells Fargo's benefit but indirectly benefited the guarantor. The Court held that Wells Fargo had not established that its conduct was in good faith and nonnegligent. In addition, the Court found that there was a triable issue of fact on the question of Job's waiver of any benefit he was to receive from the two signature requirement.

Job filed a motion for summary judgment, asking that the following four issues be deemed established in favor of Job and against Wells Fargo.

> "(1) That Bank failed to investigate and verify the factual and financial information provided to it by Jay Williams, ("Williams") president of J/W Cattle, Inc., prior to approving a $3,300,000.00 agricultural line of credit to said corporation.
>
> "(2) That Bank filed to monitor and supervise the J/W

Cattle loan pursuant to the agreed upon methodology to be employed by Bank to implement and "dual authorization" requirement which Bank itself and imposed as an express condition of the Credit Agreement.

"(3) That Job did not knowingly and intentionally waive the "dual authorization" requirement because he thought and understood that Bank had substituted a more reliable methodology for advancing proceeds and verifying the cattle purchases.

"(4) That Bank failed to abide by its own standard operations procedure due to its failure to physically inventory/appraise the livestock owned by J/W Cattle prior to the Bank's approval of the loan and the cattle thereafter purchased by Williams on behalf of J/W Cattle during the time the loan was in place at Bank."

Wells Fargo filed a cross-motion for summary judgment, asking that the trial court hold that: (1) Job was limited to a contract cause of action for the allege breach of the covenant of good faith and

fair dealing; (2) Wells Fargo had no duty to investigate and verify the factual and financial information provided to it by Williams prior to approving the line of credit to J/W; and (3) Wells Fargo had no duty under **Sumitomo Bank of Cal.** vs. **Iwasaki** (1968) 70 Cal.2d 81 (hereafter **Sumitomo**) to disclose to Job the information claimed.

Before the trial court ruled on the summary judgment motion and cross-motion, the parties entered into a stipulation. The stipulation provided that as of October 7, 1988, the status and nature of the action was to be frozen except as it might be changed by the ruling on the pending motion and cross-motion for summary judgment.

The trial court (Judge Dibiaso) granted Wells Fargo's first assertion in its cross-motion for summary judgment,

finding that "the undisputed facts pertinent to the issue proved that no" "special relationship" existed between plaintiff and defendant with respect to the loan transaction at issue. Accordingly, plaintiff could not recover a tort measure of damages under the third cause of action [breach of covenant of good faith] of the complaint. The court denied summary judgment on the two remaining issues of Wells Fargo and denied summary judgment on all of Job's four issues.

On the first day set for jury trial, November 20, 1990, the trial court (Judge O'Neill) began by granting several of Wells Fargo's motion in limine. Based on the rules on the in limine motions, the trial court granted Wells Fargo's motion for judgment on the pleadings as to all of Job's causes of action except the

sixth cause of action for declaratory relief.

Job went forward with his sixth cause of action. This matter was heard by the court because it was equitable in nature. After Job made his opening statement, Wells Fargo made several motions for nonsuit on issues pursuant to Code of Civil Procedure section 581c. The trial court granted the separate motions.

The next day Job requested to reserve his presentation of evidence as a defense to Wells Fargo's cross-compliant. After an extended discussion, Job asked to dismiss his complaint without prejudicing his right to appeal and without dismissing any of his defenses on cross-complaint. The court granted the dismissal with prejudice. Wells Fargo argued that the doctrine of retraxit

applied to Job's defenses to the cross-complaint. The trial court found that retraxit applied to Job's dismissal of his compliant. The case was continued to see if Job and Wells Fargo could reach a settlement.

Job then filed a motion for disqualification of Judge O'Neill pursuant to Code of Civil Procedure section 170.3. The judge filed a declaration in response. The matter was transferred to the Judicial Council for appointment of a neutral judge. On the day set for trial on Wells Fargo's cross-compliant, the trial court denied Job's motion to stay the proceeding until a ruling had been made on the disqualification motion. The trial proceeded.

The jury found that Job owed Wells Fargo $2,980,166.03. In a separate

proceeding the trial court awarded Wells Fargo $1,187,841.86 in costs and attorney fees.

Subsequently, Judge Breen, under appointment by the Judicial Council, denied the motion to disqualify Judge O'Neill.

DISCUSSION

I.

Petition for Writ of Mandate

A. Factual and Procedural Background

Judge Lawrence J. O'Neill was assigned to conduct the trial. On the date set for trial he heard and determined several in limine motions. His rulings eliminated all but one of Job's causes of actions.

After the adverse rulings were made, Job investigated Judge O'Neill's background by obtaining his statement of economic interest. After reviewing this

document, Job learned that prior to assuming his position on the Fresno County Superior Court bench in February of 1990, Judge O'Neill practiced law with the law firm of McCormick, Barstow, Sheppard, Wate & Carruth (McCormick Barstow). Judge O'Neill worked at the firm from September of 1979 until February of 1990, first as an associate and then as a partner. From 1983 to October of 1985, James Perkines, an attorney with McCormick Barstow, represented Donald V. Scott, who was a defendant in the San Luis Obispo County action of Job versus Williams. In this litigation, Job sued Williams and others, including Scott, for negligent misrepresentation, intentional misrepresentation, conspiracy to defraud, and other causes of action. In this action, Job claimed Williams and others

misappropriated the money loaned by Bank of America and Wells Fargo for purposes other than that which was agreed upon. Job was a guarantor on the money loaned. During the course of the Job versus Williams San Luis Obispo litigation, Wells Fargo's attorneys, Brobeck, Phleger & Harrison, were placed on the proof of service by mail list on many of the papers filed by McCormick Barstow and others in the action. On October 7, 1985, McCormick Barstow was relieved as Scott's attorney, and Scott proceeded pro se. Scott failed to appear and on November 26, 1986, a judgment in excess of $700,000 plus costs was entered against him and in favor for Job.

After learning of Judge O'Neill's former association with McCormick Barstow, Job made a motion to disqualify Judge O'Neill pursuant to Code of Civil

Procedure section 170.1, subdivisions (a)(1), (2) and (6), claiming Judge O'Neill had personal knowledge of the facts of the case, should be deemed to have served as an attorney in the proceeding, and/or his prior association with McCormick Barstow gave the appearance of impropriety.

Judge O'Neill filed a response to Job's motion for disqualification as required by Code of Civil Procedure section 170.3. Judge O'Neill's declaration was as follows:

"I, Lawrence J. O'Neill, HEREBY DECLARE:

"That I am a Fresno County Superior Court Judge, having been appointed in January of 199 and sworn in in February of 1990. Prior to that time I was first an associate and then later a partner which the law firm of McCormick, Barstow, Sheppard, Wate & Carruth from September of 1979 until February of 1990.

"While I was with the law firm of McCormick, Barstow, Sheppard, Wate & Carruth, I was in the tort litigation

department of the firm. During that same period of time, both Mr. James H. Perkens and Mr. Marshall C. Whitney were lawyers in the firm and were associated with the business department of business litigation department, respectively.

"On the late afternoon of [December] 5, 199, I received the plaintiff's notice of motion for disqualification of the trial judge, and I read same. Up until the instant that I read the motion and reviewed the attachments, I did not know nor had I heard mention of the fact that the law firm of McCormick-Barstow was ever involved, directly or indirectly, with any aspect of the **Job vs. Wells Fargo Bank** case (Fresno County Superior Court Action No. 303131.7), or the **Richard E. Job vs. Mason Williams** case (San Luis Obispo Superior Court Action 57990).

"it is indicated in the moving papers that McCormick-Barstow participated on behalf of a party not named in the instant action but rather named in the San Luis Obispo action by the name of Donald V. Scott. This participation by the McCormick-Barstow firm was from December of 1983 until September of 1985 according to the instant motion. I do not know nor have I ever heard of Donald V. Scott.

"I have never had any contact whatsoever with any aspect of the instant case of any issue concerning the instant case or any related issue involved in any related case at any time prior to the time that it was assigned to me for trial just a couple of weeks ago.

"I have not discussed this matter with Mr. Perkins nor Mr. Whitney nor do I intend to do so."

The matter was referred to the Judicial Council for appointment of a neutral judgment to hear the matter. Pursuant to Code of Civil Procedure section 170.4, subdivision (c)(1), Judge O'Neill denied Job's request to continue the trial until a ruling had been received on the disqualification motion. ON December 18, 1990, the jury trial proceeded on Wells Fargo's cross-compliant. The trial was complete on December 21, 1990.

On January 24, 1991, an order denying the motion for disqualification was filed by Judge Breen, the judge appointed by the Judicial Council. His order provides:

"The undersigned, on assignment from the Judicial Council of California,

having considered Plaintiff and Cross-Defendant Job's motion for disqualification executed on December 5, 1990 and the attachments thereto as well as the verified reply declaration and amendment thereto of the Honorable Lawrence J. O'Neill, filed on December 6, and December 14, 1990 respectively finds as follows:

"The moving party alleges that California Code of Civil Procedure section 170.1 (a)(1) and (2) apply to Judge O'Neill. Judge O'Neill, specifically denies that he has any knowledge of disputed facts in this case, or any related case other than that gained while the case was assigned to him for trial. The code does not impute knowledge to a trier of fact because of a past association in the private sector.

"Judge O'Neill was a member of a firm which participated [sic] in other actions involving parties to their lawsuit but the Judge disclaims any knowledge of his former firm's representation in these other actions, prior to the motion now before the court.

"The court finds that based on the moving papers and the response thereto the moving party has not established the grounds for disqualification set for [sic] in Code of Civil Procedure Section [sic] 170.1. The motion is denied."

On April 15, 1991, Job mailed his petition for writ of mandate, prohibition

or other extraordinary relief to this court. The petition was received by this court and filed on April 16. 1991.

B. Timeliness of the Writ Petition

Code of Civil Procedure section 170.3, subdivision (d) provides that the determination of "the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decisions."

In Job's petition for writ of mandate, the following statement was made regarding the timeliness and the petition:

> "When Judge O'Neill refused to disqualify himself, petitioner's motion for disqualification was referred to the Chair of the Judicial Council for assignment to a hearing judge. The motion was denied by the Honorable Thomas P. Breen by Order dated January 17, 1991. . . . Petitioners has never been given notice of the Order by Judge Breen or the Clerk of the Fresno County Superior

Court. Not having received notice for so long, petitioners' counsel contact Judge Breen's clerk and were told that a ruling had been handed down and sent to the Clerk of the Fresno County Superior Court. Petitioner's counsel than contacted an attorney service, the clerk of the Fresno County Superior Court having proved unwilling to send a copy of any such order and the attorney service sent a copy of the order to petitioner's counsel on April 5, 1991."

In his reply to this court's request for supplemental briefing, Job's counsel, Eugene J. Albertini, filed a declaration under penalty of perjury. It stated in pertinent part:

"When Judge O'Neill refused to disqualify himself, Petitioner's motion for disqualification was referred to the Chair of the Judicial Council for assignment to a hearing judge. I heard nothing about any decision on the motion by the Judicial Council; every time I spoke with counsel for Wells Fargo Bank, I asked if they had heard anything, but they had not either. I assumed that the judge had simply been too busy to get to the matter. I finally had my secretary contact Judge Breem's [sic] clerk (the Judicial Council Judge considering the case, who informed us that she thought a ruling had been handed down and filed with the Fresno County Superior Court clerk. I then instructed my secretary to contact this clerk to see if a ruling had

indeed been filed with the court and, if so, what it was. She informed me that the court clerk said they could not search the file, suggesting that I get an attorney service to do a search of the file.

". . . As my offices are located in Los Angeles, my regular attorney service could not handle the project, which meant search a court file in Fresno, California. Consequently, I had my secretary contact Fresno attorney service and request that they search the file for Order on Petitioner' [sic] Motion to Disqualify. They were requested to send a copy of any such Order, if one were found, to me, via overnight delivery. A copy of the Order signed by the Honorable Thomas P. Breen denying Petitioner's Motion was received by my office on April 6, 1991 and attached to the Petition. The attorney service form which came with the copy of the Order indicated that they had found in on April 5, 1991; the Order was dated January 17, 1991.

". . .After discussing the matter with Petitioner, he decided to file a Petition for Writ of Mandamus, as we felt that swift resolution of this issue could obviate the need for pursuing an expensive appeal of the judgment in the underlying action, which appeal was still in its beginning stages. I had an associate check the applicable statutes and rules for filing the Petition and was informed that, under California Code of Civil Procedure § 170.3(d), it had to be filed within ten days after we had notice of the decision and, under the applicable California Rules of Court, the Petition

would be considered filed the day it was mailed, if sent via express mail or by other overnight delivery service. To verify, I had my secretary check with the clerk of this Court, who informed me that the Petition would indeed be considered filed the day it was sent in such manner according to the Court of Appeal clerk.

". . .We had no actual notice of the order and what the ruling had been until April 6, 1991, when the copy was received from the attorney service. To be safe, however, given the fact that the attorney service had copied the document on April 5, 1991, I caused the Petition to be sent to this Court via Federal Express on April 15, 1991, knowing that it would be considered filed that day."

The purposes of Code of Civil Procedure section 170.3 are outline in **People** vs. **Hull** (1991) 1 Cal.4th 266, at page 272:

"Section 170.3 has the dual purpose of promoting 'judicial economy' and 'fundamental fairness.' [Citation.] The statue 'fosters judicial economy by eliminating the waste of time and money which inheres if the litigation is permitted to continue unabated, only to be vacated on appeal because the subsequent rulings and judgment were declared "void" by virtue of the erroneously denied disqualification motion.' [Citation.] "

By enacting Code of Civil Procedure

section 170.3, subdivision 9d), the Legislature assured that parties would receive "'" as speedy an appellate determination as possible."'" (People vs Hull, supra, 1 Cal.4th at P. 273)

A disqualification issue should be raised at the earliest opportunity. (Betz vs. Pankow (1993) 16 Cal.App.4th 931, 940-941.) IN light of the policies behind a speedy determination of disqualification issues, the time limitation should be strictly enforced and narrowly construed.

Written notice of a disqualification decision is not necessary to trigger the time limits of Code of Civil Procedure section 170.3, subdivision (d). "[T]he 10-day period begins when the party has actual notice of the denial of his disqualification motion." (Guedalia vs. Superior Court (1989) 211 Cal.App.3d

1156, 1165.)

Job claims that he did not have notice of the decision until April 6, 1991, when it was received by his office. Job argues that under the actual knowledge test of **Guedalia** he cannot be charged with knowledge on April 5, when the attorney service he hired found the order. Wells Fargo argues agency law determines Job had notice on April 5, 1991. Job counters that Wells Fargo supplies no authority to support its position, yet Job offers no counter authority.

Civil Code section 2295 defines an agent, "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Civil Code section 2332 provides, "As against a principal, both principal and agent are

deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." "Notice of a fact to an agent is deemed to be notice of that fact to the principal as well." (Allied Grape Growers vs. Bronco Wine Co. (1988) 203 Cal.App.3d 32, 448, fn. 12.) "Thus, it is a well established rule in California that the principal is chargeable with, and is bound by the knowledge of, or notice to, his agent, received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends." (Trane Co. vs. Gilbert (1968) 267 Cal.App.2d 720, 727.) Imputing knowledge from an agent to a principal is not a rebuttable presumption but a rule of law. (Ibid.)

An attorney is an agent of the client and notice to the agent is imputed to the client. (**Lovato** vs. **Santa Fe Internat. Corp**. (1984) 151 Cal.App.3d 549, 553.) An agent may employ a subagent. "The authority to appoint a subagent may be inferred from the employment of the agent in a position of general authority, which, in view of business custom and usage, or because of the nature of necessities of the business entrusted to the agent, ordinarily includes authority to appoint other agents." (**Trane Co** vs. **Gilber, supra,** 267 Cal.App.2d at p. 726.) Attorneys often hire others to aid them in work on a case. (See, for example, **National Steel Products Co.** vs. **Superior Court** (1985) 164 Cal.App.3d 476, 483-484.)

Although a determination of whether one is an agent is normally a questions

for fact (Trance Co. vs. Gilber, supra, 267 Cal.App.2d at P. 726), the facts here are uncontradicted and based solely on the declaration of Job's counsel, Mr. Albertini. Furthermore, Wells Fargo asserted an agency theory in its supplemental opposition, yet Job's only counter argument in his reply was that Wells Fargo failed to cite any authority and that Guedalia requires actual knowledge. Having failed to make any arguments against any agency theory, Job has failed to demonstrate that agency does not apply.

When Job requested an attorney service to search the file in Fresno for a judgment, an agency relationship was created. When the agent discovered the judgment, he had notice of the judgment and such notice is imputed in the principal. Thus Job had notice of the

judgment on April 5, 1991.

Regarding the dating of the filing of the petition, California Rules of Court, rule 40(n) states:

> "'Date of filing' of a brief as defined in subdivision (k)) is the date of delivery to the clerk's office during normal business hours. The brief is timely, however, if the time for its filing had not expired on the date of its mailing by certified or express mail as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt."

At the time of the filing of the writ petition, subdivision (k) of rule 40 provided, "the work 'briefs' includes petition for rehearing, petitions for review, and answers thereto." effective July 1, 1991, the following sentence was added to subdivision (k) of rule 40, "It does not include petitions for extraordinary relief in original

proceedings."

Job argues that his petition should be governed by rule 40, subdivision (k) as it read in April of 1991 when his petition was filed. He claims he should receive the benefit of rule 40(n) since rule 40(k) as it read in April 1991 did nothing to indicate it could not consider the petition as filed the day it was sent via Federal Express.

Job's argument fails. The drafters' not to California Rules of Court, rule 40(k), states "The Council . . . amended 40(k) (definition of brief) to memorialize that the 40(n) (overnight delivery service) provision does not apply to petitions for original writs." Thus it is clear that the final sentence of rule 40(k) was not a new definition of briefs but was merely a clarification giving more detail to the former rule.

Rule 40(n) thus does not establish that Job's petition for writ of mandate was timely filed.

As part of Job's argument that his petition is timely, Mr. Albertini's declaration state that his secretary called this court and a clerk of this court stated that the petition would be considered filed the day if was sent. Misinformation given by a clerk, even if actually given, cannot extend a jurisdictional time limit. (Gomes vs. Superior Court (1969) 272 Cal.App. 2d 702, 705, fn. 4.)

Job also asserts that it would be "manifestly unfair" for him to "lose his right to raise and have considered the issues surrounding the denial of his motion to disqualify the trial judge in the underlying action, when such issues could have been raised in the appeal

briefs." "[A] writ of mandate shall be the exclusive means of challenging a denial of a motion to disqualify a judge." (**People** vs. **Hull, supra,** 1 Cal.4th at P. 275.) The California Supreme Court in **People** vs. **Brown** (1993) 6 Cal.4th 322 recently considered whether a due process claim of judicial bias could be raised on appeal. In **Brown**, the Supreme Court said:

"Section 170.3(d) applies to all **statutory** judicial disqualification claims--even those claims based on statutory provisions that, like section 170.1, subdivision (a)(6)(C), appear to codify due process grounds for relief--but section 170.3(d) does not apply to, and hence does not bar, review (on appeal from a final judgment) of **nonstatutory** claims that a final judgment is constitutionally invalid because of judicial bias." (**Id**. at p. 335.)

The Supreme Court limited review of nonstatutory claims by stating,

"In order to give maximum effect to the Legislature's clear intent that disqualification challenges be subject to prompt review by writ [citation], we conclude that a litigant may, and should,

seek to resolve such issues by statutory means, and that his negligent failure to do so may constitute a forfeiture of his constitutional claim. But we also conclude that, because defendant (i) sought writ relief as required by section 170.3(d) . . . , and (ii) writ relief was summarily denied, he may assert on appeal, based on facts alleged in his unsuccessful disqualification motion under section 170.1, subdivision (a)(6)(C), a constitutional due process claim that the judge who presided over his hearing was not impartial." (People vs. Brown, supra, 6Cal.4th at P. 336, fn. omitted.)

Job's bias claims all appear to be purely statutory claims and thus had to be raised in a writ petition. Job has not shown that his grounds for disqualification were based on due process ground. Furthermore, Job's failure to timely file his writ petition is equal to a negligent failure to file a petition and should constitute a forfeiture of his constitutional claims, if any.

As a final, point, we not that "'[a] party seeking relief by way of an

extraordinary writ is required to move expeditiously.'" (**People** vs. **Miller** (1992) 6 Cal.App.4th 873, 881.) Any significant delay in seeking collateral relief must be fully justified. (**People** vs. **Wells** (1967) 67 Cal.2d 873, 875.) Job's initial motion for disqualification was filed on December 5, 1980. The motion was sent out for assignment of a trial judge by the Judicial Council, and the trial court determined it would go forward with the trial without a decision on the disqualification motion. The order denying the motion for disqualification was filed on January 24, 1991, after the jury trial had been completed. Although it is true that Job did not receive a copy of the ruling on the disqualification motion, it appears he did little to determine if such a ruling had been made. During the interim

period, of almost three months, of the ruling on the disqualification and Job's receipt of the ruling, Wells Fargo filed a motion for reasonable costs and attorney fees (Feb. 1991), and Job replied to the motion. A decision of this motion was made on April 26, 1991, and judgment was entered on May 29, 1991. Thus Job proceeded with opposition to action before a trial judge he had sought to disqualify without determining the status of his motion. This falls far short of moving expeditiously. Job has shown no justification for this delay.

Thus, Job is charged with having notice of the denial of his disqualification motion on April 5, 1991, at the latest. The time limits of Code of Civil Procedure section 173, subdivision (d) are jurisdictional. Job's petition was not filed until April

16, 1991. This was one day past the jurisdictional time limit. California Rules of Court, rule 40(k) has no application to the filing of extraordinary writs and Job can gain no relief based on that rule. Because the petition was not filed within the jurisdictional limits, it is denied as not timely filed

Wells Fargo's motion to strike portions of Job's reply to Wells Fargo's opposition to the petition is denied as moot.

II.

Challenges to Trial Rulings

A. Terms of Agreements

The continuing guaranty and the line of credit notes form the basis for many of the trial court's ruling s and many of the arguments on appeal.

The continuing guaranty executed by

Job provided in pertinent part:

> "(4) AUTHORIZATION S TO BANK. Guarantors authorize Bank, either before or after revocation hereof, without notice or demand and without affecting their liability hereunder, from time to time to (a) renew, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the Indebtedness or any part thereof, including increase or decrease of the rate of interest thereon; (b) take and hold security for the payment of this Guaranty or the Indebtedness guaranteed, and exchange, enforce, waive and release any such security; (c) apply such security and direct the order or manner of sale thereof, including without limitation, a non-judicial sale permitted by the terms of the controlling security agreement or deed of trust, as Bank in its discretion may determine; and (d) release or substitute any one or more of the endorses or guarantors. Bank may without notice asking this Guaranty in whole or in part.
>
> "(5) GUARANTORS' WARRANTIES. Guarantors warrant that (a) this Guaranty is executed at Borrowers' request; (b) Guarantors have not and will not, without prior written

consent of Bank, sell, lease, assign, encumber, hypothecate, transfer or otherwise dispose of all or substantially all of Guarantors' assets, or any interest therein; and (c) Guarantors have established adequate means of obtaining from Borrowers on a continuing basis financial and other information pertaining to Borrowers' financial condition. Guarantors agree to keep adequately informed from such means of any facts, events or circumstances which might in any way affect Guarantors' risks hereunder. With respect to information or material acquired in the normal course of Bank's relationship with Borrowers, Guarantors agree that Bank shall have no obligation to disclose such information or material to Guarantors.

"96) GUARANTORS' WAIVERS. Guarantors waive any right to require Bank to (a) proceed against any person, including Borrowers; (b) proceed against or exhaust any Collateral held from Borrowers, any other Guarantor or any other person; (c) give notice of the terms, time and place of any public or private sale of personal property security held from Borrowers or comply with any other provisions of Section 9504 of the California Uniform

Commercial Code; (d) pursue any other remedy in Bank's power; or (e) make any presentments, demands for performance, or give any notices of nonperformance, protests, notices of protests or notices of dishonor in connection with any obligations or evidences of Indebtedness held by Bank as security, in connection with any obligations or evidences of Indebtedness which constitute in whole or in part the Indebtedness guaranteed hereunder, or in connection with the creation of new or additional Indebtedness.

"Guarantors waive any defense arising by reason of (a) any disability or other defense of borrowers, any other Guarantor or nay other person; (b) the cessation from any cause whatsoever, other than payment in full, of the indebtedness of Borrowers, any other Guarantor or any other person; (c) the application by Borrowers of the proceeds of any Indebtedness for purposes other than the purposes represented by Borrowers to Bank or intended or understood by Bank or Guarantors; (d) any act or omission by Bank which directly or indirectly results in or aids the discharge of Borrower of any Indebtedness by operation of law or otherwise; or (e) any modification of the

Indebtedness, in any form whatsoever, including any modification made after revocation hereof to any Indebtedness incurred prior to such revocation, and including without limitation the renewal, extension, acceleration or other change in time for payment of the Indebtedness, or there change in the terms of the Indebtedness or any party thereof, including increase or decrease of the rate of interest thereon. Until all Indebtedness shall have been paid in full, Guarantors shall have no right of subrogation and Guarantors further waive any right to enforce any remedy which Bank now has or may hereafter have against Borrowers, any other Guarantor or any other person, and waive any benefit or, or any right to participate in any security whatsoever now or hereafter held by Bank including any rights which Guarantors might have by reason of any rights, powers or remedies of Borrowers in connection with any anti-deficiency or similar laws limiting or qualifying Borrowers' Indebtedness (including without limitation Sections 726 and 580d of the California Code of Civil Procedure as from time to time amended).

"(7) GUARANTORS'

UNDERSTAINDGS WITH RESPECT TO WAIVERS. Guarantors warrant and agree that each of the waivers set forth above are made with Guarantors' full knowledge of their significance and consequences, and that under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any of said waivers are determined to be contrary to any applicable law or public policy, such waivers shall be effective only to the extent permitted by law ."[4]

The "line of credit note" between Wells Fargo and J/W is the basis of the "dual authorization" arguments. The following paragraph is the critical portion:

"Advances hereunder, to the total amount of the principal sum stated above, may be made by Bank at the oral or written request of Jay M. Williams & Richard E. Job, Jr. or _____ - _____ any one acting along, who are authorized to request Advances and direct the disposition of any such Advances until written notice of the

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4 Job did not read the terms of this agreement except for the few portions typed in at the beginning of the agreement.

revocation of such authority is received by Bank at the office designated above. Any such Advances shall be conclusively presumed to have been made to or for the benefit of Borrowers when Bank believes in good faith that such request and directions have been made by authorized persons, or when said Advances are deposited to the credit of the account of Borrower with Bank regardless of the fact that persons other than those authorized hereunder may have authority to draw against such account."[5]

B. Interpretation of Agreements

Our interpretation of the above two documents concerns whether "dual authorization" is required, and, if so, what is meant by dual authorization; and whether the provisions contained in the continuing guaranty are enforceable. The enforceability discussion will focus on whether the guaranty was a contract of adhesion, is unconscionable or is a "de

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5 The portions of this quote in bold face are typed portions of the agreement. The remainder of the form is a preprinted Wells Fargo form.

facto cognovit" agreement.

1. <u>What is the form of dual authorization required by the credit agreement</u>?

Job contends dual signatures are required for drafts issued pursuant to the credit agreement. Wells Fargo does not contest that the agreement requires dual <u>authorization</u>; however, it disagrees that dual <u>signatures</u> are required.

Civil Code section 1651 provides:

> "Where a contract is partly written and partly printed, or where part of it is written or printed under the especial directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control and printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded."

"The word 'written' in the statute includes typewritten." (Gutzi Associates vs. Switzer (1989) 215 Cal.App.3d 1636, 1642.)

Here the typewritten portion of the agreement listing Williams **and** Job comes before the preprinted "or" and a blank space followed by "any one acting alone." The preprinted form in its unaltered form clearly envisioned that advances could be made by one person **or** another person, or either one acting alone. By typing in Williams and Job together before the "or" and before the blank space followed by "any one acting alone," it was clearly the intention to not follow the "or" designation and was the intention to alter the normal procedure. The only reasonable interpretation of the form pursuant to Civil Code section 1651 is that advances had to be authorized by

Williams **and** Job. Dual authorization was required.

However, nothing in the inserted language alters the printed form's allowance that a draft may issue upon "oral or written request." The note is clear. Advances had to be authorized by Williams and Job; but such authorization could be oral **or** written.

2. Is enforcement of the continuing guaranty precluded based on unconscionability?

ON more than one occasion, the trial court discussed whether unconscionability would preclude enforcement of the waivers in the guaranty. Wells Fargo's fifth motion **in limine** was to preclude Job from arguing that provisions in the continuing guaranty are ineffective or unenforceable. Wells Fargo argued in its moving papers that Job's failure to plead

adhesion and unconscionability precludes him from asserting those claims. Wells Fargo further argued that Job failed to amend his complaint to allege adhesion or unconscionability. Wells Fargo then argued that the guaranty was not a contract of adhesion nor was it unconscionable.

Job's written opposition to this motion asserted that Wells Fargo could not present in limine motions that were in effect motions of summary judgment. Job's second argument was that Judge Dibiaso's denial of summary judgment, or Wells Fargo's claim that Wells Fargo had no duty to investigate prior to approving the line of credit and Wells Fargo had no duty to disclose pursuant to Sumitomo, supra, 70 Cal.2d 81, is determinative.

During the discussion on the fifth motion in limine the following occurred:

"THE COURT: . . . My question to you is, have you pled that the contracts were unenforceable?

"MR. ALBERTINI [Job's counsel]: No, I have not.

"THE COURT: Don't -- isn't that what you're saying if you -- if you are opposing motion in limine number five?

"MR. ALBERTINI: Let me look at motion in limine number five.

"THE COURT: In other works, all the motion in limine number five is asking to preclude your argument that the continuing guaranty and third party pledge are ineffective or unenforceable. Let's just use the work 'unenforceable.'

"MR. ALBERTINI: I agree I have not argued that, and I haven't pled it.

"THE COURT: All right. Motion is granted. It doesn't appear as though there's an issue on it."

After Job made his opening statement on his sixth cause of action (declaratory relief), Wells Fargo made several motions for nonsuit. The sixth portion of the

nonsuit motion by Wells Fargo after Job's opening statement was the Job failed to make any statements challenging Wells Fargo's failure to disclose any fact known to the bank that it had reason to believe materially increased Job's risk beyond what he intended to assume. In addition to Job's not mentioning this in his opening argument, Wells Fargo argued that the continuing guaranty also supported nonsuit on this point.

The trial court asked Job if he had anything to add. Job argued that the clauses in the continuing guaranty were adhesive and unconscionable and that Wells Fargo could not continue to hide behind them. Wells Fargo added that in limine motion No. 5 dealt with adhesion and unconscionability, but also argued that the continuing guaranty was not adhesive or unconscionable. The trial

court rejected the unconscionability/adhesion argument under Civil Code section 1670.5 and granted portion six of Wells Fargo's motion for nonsuit.

Job makes several arguments on appeal dealing with unconscionability and adhesion. First he argues that unconscionability is a defense and need not be presented by way of an affirmative cause of action. Job then claims the continuing guaranty was contract of adhesion. Job also contends that the trial court could not have determined the question of adhesion of unconscionability since this is a mixed question of law and fact. Job believes that the failure of the trial court to inquire into the setting, purpose and effect of the contracts indicates it was not ruling that the contracts were adhesive and

unconscionable.

Wells Fargo asserts first that Job's failure to plead adhesion and/or unconscionability precluded him from arguing it below and arguing it now on appeal. Wells Fargo finds no error in the trial court's not granting leave to amend since Job never asked for leave to amend nor did he present facts below or on appeal giving rise to an adhesion or unconscionability argument. Finally, Wells Fargo argues the guaranty was enforceable and was neither adhesive nor unconscionable.

Civil Code section 1670.5 provides:

> "(a) IF the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to

avoid any unconscionable result.

"(b) When it is claimed or appears to be court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

Relying on Civil Code section 1670.5 and Dean Witter Reynolds Inc. v. Superior Court (1989) 211 Cal.App.3d 758, Job contends that court's ruling is flawed if it required him to affirmatively plead unconscionability as a cause of action. In Dean Witter, an action was brought challenging the legality of certain fees charged by Dean Witter. The plaintiff pled a third cause of action for "'Unconscionable Prices and Practices' . . . grounded on Civil Code section 1670.5." (Id. at p. 766.) Dean Witter argued "that Civil Code section 1670.5 does not create an affirmative cause of

actin but merely codifies the defense of unconscionability." (Ibid.) The appellate court agreed and found that "the language of Civil Code section 1670.5 does not support the bringing of an affirmative cause of action." (Ibid.)

Wells Fargo relies on IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal.App.3d 451 for the argument that Job waived an unconscionability argument by not pleading it. IMO and Dow entered into the contract. When a disagreement arose, they entered into a second contract which contained a waiver provision holding Dow harmless with reference to all claims arising out of the previous contracts or agreements. IMO sued and in the fourth cause of action sought to have the waiver provision of the contract declared invalid and unenforceable because it was

obtained under economic duress. (Id at pp. 454-456.) Dow cross-complained, seeking to enforce the promissory note which was part of the second contract. IMO pleaded an affirmative defense of unenforced ability. (Id. at pp. 456-457.) Dow's motion for judgment on the pleadings on the fourth cause of action was granted based on the proposition that partial rescission is not recognized as a remedy. (Id. at p. 457.) The appellate court agreed that partial recession did not apply to this contract. IMO then argued that the trial court had authority to permit differential enforcement under Civil Code section 1670.5. (135 Cal.App.3d at p. 459.) The appellate court rejected this argument.

> "nowhere did IMO allege in the pleading that it sought a declaration of the invalidity of paragraph 9 (c) as an 'unconscionable' provision, nor did it allege ultimate facts

> demonstrating its unconscionability. For instance, there are no allegations that the sales agreement constituted a contract of adhesion whereby one party unfairly took advantage of another's weaker bargaining position or that the waiver provision was unduly one-sided, oppressive, or inherently unfair. In short, plaintiff has failed to allege any facts to bring itself within the purview of section 1670.5." (IMO Development Corp. v. Dow Corning Corp., supra, 135 Cal.App.3d at P. 460.)

The case here is more analogous to IMO than to Dean Witter. As will be discussed later, the viability of many of Job's causes of actions turns first on a determination whether the waiver of rights in the continuing guaranty was enforceable or not. Therefore, underlying these causes of action was a duty on Job to allege ultimate facts demonstrating the unenforced ability of the provisions. It was not necessary to

plead unconscionability or adhesion as a separate cause of action, as noted in Dean Witter, but it was necessary to allege unconscionability and/or adhesion as the underlying basis for Job's causes of action that could not proceed unless the continuing guaranty was unenforceable. The trial court correctly ruled the Job's failure to plead unconscionability and/or adhesion as part of his causes of actin precluded him from presenting evidence or arguing unconscionability or adhesion as part of his case. The burden should not be on defendant to plead and prove the agreement is not unconscionable but should be on the plaintiff to raise the unconscionability issue properly in the trial court. (see Westlye vs. Look Sports, Inc. (1993) 17 Cal.App.4th 1715, 1738-1739, and General Motors Corp. v.

Superior Court (1993) 12 Cal.App.4th 435, 439, 443.)[6]

Not only did Job never plead unconscionability or adhesion, but after the court ruled he could not argue adhesion and unconscionability, Job never made a motion to amend his pleadings to allege such facts. Furthermore, had Job made such a motion, he would have had a burden of showing how the pleadings could be amended to constitute a legally sufficient allegation. (Careau & Co. vs. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1387-1388.) Job did not allege below nor has he alleged on appeal

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6 By analogy, see Union Carbid Corp. v. Superior Court (1984) 36 Cal.3d 15, 25, where the court held that a plaintiff had the burden to anticipate the defense of the statute of frauds and plead facts to negative the bar. Here, Job had to anticipate that Wells Fargo would seek to enforce the provisions of the continuing guaranty and utilize them as a bar to Jobs' actions.

what facts he would present to cure the defect in his pleading. Job's above failures waive his ability to argue unconscionability or adhesion now.

Job also argues that the trial court could not properly determine the issue of unconscionability because it is a mixed question of law and fact.

> "'[A] determination of unconscionability, though a question of law, involves various factual considerations, including the business conditions under which the contract was formed, the relative bargaining power of the parties, their reasonable expectations, and the commercial reasonableness of the risk allocation as provided in the agreement.'" (U.S. Roffing, Inc. vs. Credit Alliance Corp. (1991) 228 Cal.App.3d 1431, 1450.)

As the above discussion indicates, Job never even reached the point where the trial court had to determine the question, although the trial court did later rule that the provisions were not

unconscionable. Such a ruling was not necessary based on the early ruling of Job's failure to properly plead the allegations.

Furthermore, Job cites no authority, nor have we found any, which states that unconscionability is a jury question. Additionally, when Job attempted to make the unconscionability and adhesion arguments, his arguments were directed to the clauses themselves and not to any extrinsic evidence surrounding the making of the contract. Thus, Job did not argue below, nor has he argued here, that any factual considerations bore upon the question. Had it been necessary for the trial court to rule on the merits, a determination of whether the continuing guaranty is unconscionable or adhesive on

its face is purely a question of law.[7]

In any event, appellant fell well short of setting forth a case of unconscionability. It has been repeatedly held that guaranty contracts are not contracts of adhesion because these contracts create a liability and do not limit the liability of the preparer of the contract. (Oakland Bank of Commerce v. Washington (1970) 6 Cal.App.3d 793, 799; Union Bank vs. Ross (1976) 54 Cal.App.3d 290, 295-296; Security National Bank vs. Adamo (1983) 142 Cal.App.3d 492, 497; Cathay Bank vs. Lee (1993) 14 Cal.App. 4th 1533, 1541-1542.) Citing Holmes vs. City of Los Angeles (1981) 117 Cal.App.3d 212, 216-

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7 We additionally note a conclusory allegation of unconscionability does not require an evidentiary hearing. (Perdue vs. Crocker National Bank (1985) 38 Ca.3d 913, 926-927.)

217, a case not involving a guaranty, Job asks this court to find the guaranty was a contract of adhesion because Wells Fargo intended the guaranty to limit its obligation to Job as guarantor. Job's authority does nothing to contradict the long line of authority holding otherwise. Furthermore, a contract of adhesion is fully enforceable unless other factors render it otherwise. (See Perdue vs. Crocker National Bank, supra, 38 Cal.3d at P. 925.)

Absent a rule or public policy precluding a waiver, waivers can be made. (Pearl vs. General Motors Acceptance Corp. (1993) 13 Cal.App.4th 1023, 1029.) Rights important to the guarantor may be waived if those rights are not so important to the public interest. (Ib. at p. 1030.)

The principle of unconscionability

is one of provision of oppression and unfair surprise. The basic test is whether the clauses are so one-sided as to be unconscionable. (See Patterson vs. ITT Consumer Financial Corp. (1993) 14 Cal.App.4th 1659, 1664-1665.)

Job has not specified facts below or on appeal which sufficiently bear on the question of unconscionability. He has failed to show error that demonstrates that adhesion or unconscionability precludes enforcement of the continuing guaranty.

3. Were the provisions of the continuing guaranty "de facto" cognovit agreements which unconstitutionally deprived Job or property without due process?

"[I]n every case involving a deprivation of property within the purview of the due process clause, the

Constitution requires some form of notice and a hearing." (Beaudreau vs. Superior Court (1975) 14 Cal.3d 448, 458.) A cognovit clause in a contract authorizes a confession of judgment which "purports to authorize entry of judgment without prior notice and hearing." (Isbell vs. County of Sonoma (1978) 21 Cal.3d 61, 68.) "[A] judgment entered pursuant to such a confession is constitutional only if the confession constitutes a valid waiver of the debtor's due process rights." (Ibid.) (See Code Civ. Proc., §§ 1132, 1133.)

Although Job admits there is no cognovit provision in his contract per se, he argues that the interpretation given to the contract by the court effectively any defenses he might have had to the judgment and resulted in a "de facto" cognovit clause.

Job has cited no authority for his theory of "de facto" cognovit clauses or have we found any authority which resembles such an argument. Job was given notice and a hearing. The continuing guaranty was not a cognovit agreement depriving Job of property without due process.

C. Trial motions

At the outset of trial, Wells Fargo made a series of motion in limine. After the motions had been ruled on, much of Job's case was eliminated. Job challenges nine of Wells Fargo's motion in limine as incorrectly granted. In addition to challenging the rulings themselves, Job challenges the procedures utilized because they were more akin to rulings on a summary judgment motion, yet summary judgment procedures were not followed.

"Motions in limine are a commonly used tool of trial advocacy and management in both criminal and civil cases. Such motions are generally brought at the beginning of trial, although they may also be brought during trial when evidentiary issues are anticipated by the parties. In either event, they are argued by the parties, either orally or in writing or both, and ruled upon by the trial judge. The usual purposed of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. [Citation.] 'The advantage of such motions is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury.' [Citation.]

"Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence.

> Finally, by resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements. [Citation.]
>
> "Under appropriate circumstances, a motion in limine can serve the function of a 'motion to exclude' under Evidence Code section by allowing the trial court to rule on a specific objection particular evidence." (People vs. Morris (1991) 53 Cal.3d 152, 188.)

"[C]ourts have inherent equity, supervisory and administrative power [citation] as well as inherent power to control litigation before them." (Cottle vs. Superior Court (1992) 3 Cal.App.4th 1367, 1377.) "Courts have broad authority over the admission of evidence.: (Id. at p. 1379.) Motions in limine are an example of the court's inherent power. (Id. at p. 1381.)

In Cottle vs. Superior Court, supra 3 Cal.App.4th 1367, the appellate court

upheld the trial court's ruling on in limine motions excluding evidence on one cause of action because the plaintiffs were unable to establish a prima facie case.

In Clemens vs. America Warranty Corp. (9187) 193 Cal.App.3d 444, defendants filed six motions in limine to exclude evidence. The motions were granted and were in net effect an objection to all evidence. After the granting of the motions, the trial court suggested the defendants move to dismiss the causes of action. Defendants made the motion, and the trial court dismissed the complaint. (Id. at pp. 448-450.) On appeal, plaintiff challenged the manner in which the dismissal occurred. The appellate court upheld the dismissals.

> "Following the sustaining of such objection, a separate motion for judgment on the pleadings is not essential, and

> an objection to all evidence which is sustained may be followed by a judgment in favor of the objecting party. [Citation.]
>
> "While unorthodox, the irregularity here was nonprejudicial. The motion in limine were properly granted pursuant to the applicable law as set forth in the respondents' supporting papers. Had respondents next objected to the introduction of all evidence, such objection inevitably would have been sustained and a dismissal would have followed. Accordingly, the prejudice to Clemens from the procedural peculiarities was nonexistent. For the legal reasons set forth infra, dismissal was not inappropriate following the granting of respondents' motions in limine in this procedurally unusual case." (Clemens vs. American Warranty Corp. supra, 193 Cal.App.3d at p. 452.)

Here, following the granting of the motions in limine, Wells Fargo made a motion for judgment on the pleadings except for the sixth cause of action for declaratory relief. The trial court granted the motions. As we will discuss,

the granting of the in limine motions eliminated any evidence potentially supportive of the particular causes of action. leading to their dismissal; those dismissals are supported by the above authority.

Job next claims the trial court did not properly consider the in limine motions because Wells Fargo filed its motions early and Job's opposition and his own motions were filed the day of the hearing. The trial court assured Job that his papers were not late. The trial court then informed Job that he could respond orally to Wells Fargo's motion in limine even though the court had not read Job's opposition. Job agreed to this procedure. Having agreed to this procedure below, Job cannot complain now on appeal. Nor has Job shown how his arguments would have differed if the

court had read his written opposition prior to ruling on the motions in limine. Job also repeatedly insists the trial court's rulings were imprecise, confusing and laced clarity. Job never formulates his complaints into an argument with authority; the complaints lack merit.

1. Did the trial court properly grant Wells Fargo's first motion in limine to exclude evidence the drafts were unauthorized because they did not contain the signatures of Williams and Job?

Wells Fargo's first moved in limine to exclude evidence or argument that drafts were unauthorized because of who signed them and to exclude evidence of the purported agreement that Williams was to personally sign drafts drawn on J/W's line of credit. In its motion, Wells Fargo claimed that identity of signatures

was irrelevant because the contract created no duty concerning the identity of persons signing drafts and J/W's losses were a result of Williams's conduct independent of who signed the draft. Additionally, Wells Fargo asserted the parol evidence rule.

Wells Fargo based its argument on the fact the contract says that signatures are not required. The trial court attempted to focus the argument and stated to Wells Fargo, "Your motion is intended to preclude the plaintiff from arguing that just because the authorization was oral that it was unauthorized?" Wells Fargo agreed that the trial court had properly stated the motion. The trial court questioned Job whether his position was that all oral authorizations were unauthorized. Job argued that authorization from Williams

had to be in writing, and Job's authorizations could be oral.

> The trial court ruled as follows:
>
> "The ruling on the first motion in limine is that it is granted in that the Plaintiff is precluded to argue that because -- just because the authorizations were oral they were unauthorized. That is different from saying that the Plaintiff can't argue that the authorizations were unauthorized for some other reason or reasons."

The trial court asked if there were any questions on the ruling. None were stated.[8] Later, in discussing the second motion in limine, Job argued again that Williams had to sign drafts but Job could give oral authorizations. To this, Wells Fargo responded that it thought the first motion meant, "We're out of the ball park

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[8] Job's failure to question the ruling precludes him from arguing on appeal that the ruling was unclear and/or should have been more detailed.

in taking signatures." The trial court responded, "True."

Job argues that the trial court did not rule "with much particularity" and the trial court's ruling are even less clear based on the above comment by the trial court during the discussion of the second motion in limine. Job contends that signatures on drafts were probative to show that Wells Fargo should have been on notice that something was wrong; therefor, the trial court's agreement with the "out of ball park" statement was wrong.

Job states in his opening brief:

"As a result of the confusing manner in which the court initially ruled on Wells Fargo's first motion in limine and the subsequent comments about the ruling, it is virtually impossible to tell what Just O'Neill really intended his ruling to be. It is therefore extremely difficult to pinpoint the error(s) in the court's ruling on the first motion in limine,; the initial, narrow ruling is hardly objectionable, but the subsequent expansion of the

ruling was uncalled for and erroneous. More importantly, whatever the ruling was or became, it served as the basis for other erroneous rulings later in the trial."

The trial court's ruling as previously set forth was clear. The trial court did not expand the ruling when it agreed that signatures were out of the ball park. This statement was made during the second motion in limine and when Job persisted with his argument that Williams had to sign all drafts. such a signature argument was "out of the ball park" and did nothing to expand the trial court's clear pronouncement of its ruling on the first motion in limine. Because authorizations could be oral, Job could not offer evidence or argue that the failure to obtain Williams's signature resulted in an unauthorized debit against the credit line. Job has failed to show that the trial court's

ruling on the first motion in limine was erroneous.

As part of his argument ton the first in limine motion of Wells Fargo, Job contends the trial court erred in holding that dual authorization was not required. [9] As previously noted, the credit note required dual authorization, but such authorization could be oral or in writing. The trial court did make a

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[9] Job infers that the failure of the trial court to find dual authorization and a dual signature requirement contradicts Judge Thaxter's order. Judge Thaxter set forth his analysis using the term "dual signature requirement." For the purposes of summary judgment only, Wells Fargo assumed there was a two-signature requirement. Thus, Judge Thaxter never ruled on whether the authorization required by the credit note had to be oral or in writing or whether it had to be a dual authorization. Nothing in the trial court's order contradicted anything of dispute presented to and ruled on by Judge Thaxter in the summary judgment motion.

passing comment that it thought Job or Williams could act alone, but it did not so hold. The court did not rule that there was no dual authorization requirement. Job's argument thus fails. The first in limine motion was properly granted and limited in scope as stated by the trial court.

2. Did the trial court erroneously grant Wells Fargo's third motion in limine to exclude evidence on Job's tort causes of actions and any arguments or claims outside of the contract?

Wells Fargo's third motion in limine was to exclude Job's tort causes of action, to exclude his affirmative defense of comparative negligence, and to exclude all arguments on duties outside of the contract. The trial court granted the motion.

Job did not dispute below that his

affirmative defense of comparative negligence should be excluded nor does he raise this issue on appeal. Nor does Job challenge on appeal the trial court's upholding of the earlier ruling by Judge Dibiaso on a summary judgment motion that Job has no tort cause of action under his third cause of action for the breach of the implied covenant of good faith and faire dealing. [10]

The first two causes of action were for negligence. In the first cause of action, Job alleged that Wells Fargo owed a duty to disclose to him that the risk being assumed by Job was other than Job expected to assume; Wells Fargo allegedly breached its duty of disclosure by

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10 See Careau & Co. vs. Security Pacific Business Credit, Inc., supra, 222 Cal.App.3d at page 1400, where the court held there was no special relationship between a bank and a commercial borrower as to justify tort recovery for breach of the implied covenant.

failing to inform Job that drafts with unauthorized signatures were being honored. The second cause of action alleged that Wells Fargo owed Job a common-law duty of reasonable care and breached its duty when it disbursed funds without the required signatures.

The court questioned Job whether the first cause of action for negligence arose from the covenant of good faith and fair dealing. Job replied that "definitely" the duty came from the covenant of good faith and fair dealing. Wells Fargo argued that the breach alleged by Job involved unauthorized signatories, and that was resolved in Wells Fargo's first motion in limine. Wells Fargo also argued that Job's agreement allowed Wells Fargo to change the terms of the underlying indebtedness. Job argued that the duty arose pursuant

to Sumitomo, supra, 70 Cal.3d 81. The trial court ruled that based on the previous summary judgment ruling by Judge Dibiaso, the issue had been decided; the motion was granted.

During Wells Fargo's motion for nonsuit the trial court revisited its ruling on the third motion in limine. The trial court was concerned that although its earlier ruling was correct, its analysis was incorrect based on Job's incorrect answer to the court's questioning. The trial court sated that the ruling should stand but it should be based on the continuing guaranty and Evidence Code section 622.[11]

Job asserts the trial court erred in

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[11] Evidence Code section 622 provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

its ruling on Wells Fargo's third motion in limine. First, Job criticizes the trial court's focusing on the action for breach of the covenant of good faith and fair dealing without mentioning the negligence causes of action. Next, Job argues that the trial court's ruling overruled Judge Thaxter's order and asserts that Judge Thaxter ruled that Wells Fargo owed Job a duty. Job complaint that he should not have been precluded rom his tort causes of action simply because there was a contract between Job and Wells Fargo. Job also contends that the tort duty owed here springs from Commercial Standard Ins. Co. vs. Bank of America (1976) 57 Cal.App.3d 241 and Sumitomo. Job asserts that the legal duty owing from a creditor to a guarantor exists irrespective of the existence of a contract.

Job's first argument, that the trial court failed to properly focus, is answered by the trial court's correction of its initial reasons when it ruled on the third motion in limine.

Judge Thaxter ruled on Wells Fargo's summary judgment motion. IN that motion, Wells Fargo sought to preclude Job from relying on the dual authorization requirement. Wells Fargo argued the dual authorization requirement was strictly for Wells Fargo's benefit and therefore, Job had no right to enforce it, and, assuming Job had any interest in the dual authorization requirement, he waived any right to enforce it.

Job countered Wells Fargo's summary judgment argument by asserting that the waiver of the two-signature requirement was not relevant to the issue of Wells Fargo's liability to Job. Job for the

first time asserted the problem was that Wells Fargo failed to inventory cattle, failed to investigate J/W, failed to investigate Williams, and did not periodically appraise livestock. Job argued that he reasonably expected We..s Fargo to follow its customary banking procedure. Without really addressing Wells Fargo's motion, Job briefly mentioned that the provisions affected the rights or each party. Job concluded by provisions affected the rights of each party. Job concluded by arguing that the two-signature requirement was a smoke screen.

Wells Fargo's response to Job's opposition papers was that Job's position was irrelevant and improper and addressed issues bearing to relationship to the motion before the court.

Judge Thaxter denied Wells Fargo's

motion, ruling in pertinent part as follows:

> "ON a motion for summary adjudication the moving party has the burden of establishing evidentiary facts necessary to a determination of the particular issue in the moving party's favor. Beech Aircraft Corp. vs. Sup. Ct. (1976) 61 Cal.App.3d 501.) Here the plaintiff has alleged that the bank's failure to observe the 'two-signature requirement' was both negligence and a breach of the implied covenant of good faith and fair dealing. The bank has not produced evidence establishing that its conduct was both in good faith and non-negligent. Instead, it seems to contend that it had the absolute right to waive the 'two-signature requirement.' Because the requirement indirectly benefitted [sic] the plaintiff, however, the court cannot determine this issue in the bank's favor as a matter of law."

Judge Thaxter also rejected the waiver theory of Wells Fargo. This portion of the judgment this not in issue on appeal.

Although Judge Thaxter's ruling

mentioned negligence and breach of good faith, Judge Thaxter was not called upon to rule whether these tort causes of action remained in light of the continuing guaranty. Job has not pointed to anything to show that Judge Thaxter was called upon to determine this issue. His comments were merely surplusage to his ruling that the signature requirement indirectly benefited Job, and therefore Wells Fargo's argument--that it had the absolute right to waive the requirement--was erroneous. Judge Thaxter's ruling goes no further than this and does not involve a ruling on the questions presented on Wells Fargo's third motion in limine.

Job contends the tort duty arose independent of the contract. He relies on Commercial Standard Ins. Co. vs. Bank of America, supra, 57 Cal.App.3d 241. In

Commercial Standard, an owner of land got a construction loan with the bank. As part of the loan, the bank required a performance bond, which was issued by C.S. (surety) to the owner as part of the loan to the owner. The bank agreed to disburse construction funds according to a particular formula. The contractor defaulted. Surety alleged a cause of action against bank for the negligent disbursement of loan process. (Id. at pp. 244-246.) The bank's demurrer to this cause of action was sustained. The appellate court reversed and found that bank owed surety a duty of reasonable care in the disbursement of the loan process in accordance with the formula, particularly when bank was aware of the surety, having requested the performance bond. (Id. at p. 248.)

Commercial Standard has no

application here. Unlike the relationship in Commercial Standard between the bank and the surety, the relationship here between Job and Wells Fargo was governed by contract. In the recent case of Harris vs. Atlantic Richfield Co. (1993) 14 Cal.App.4th 70, we discussed tort remedies in the context of commercial contracts. Harris had a written franchise agreement with ARCO. Harris claimed ARCO mistreated him and sought damages against ARCO for several causes of action, including tortious breach of a written contract in violation of public policy. (Id. at p. 72.) The jury found in Harri's favor on this cause of action. The trial court granted a motion for judgment notwithstanding the verdict on this cause of action, and Harris appealed. (Id. at p. 73.)

We extensively analyzed tort

remedies in the context of commercial contracts. Our discussion included the following:

> "The traditional goal of contract remedies is compensation of the promisee for the loss resulting from the breach, not compulsion of the promisor to perform his promises. Therefore, 'willful' breaches have not been distinguished from other breaches. [Citation.] The restriction on contract remedies serve purposes not found in tort law. They protect the parties' freedom to bargain over special risks and they promote contract formation by limiting liability to the value of the promise. This encourages efficient breaches, resulting in increased production of goods and services at lower cost to society. [Citation.] Because of these overriding policy considerations, the California Supreme Court has proceeded with caution in carving out exceptions to the traditional contract remedy restrictions. [Citations.] To date, only three exceptions have been recognized." (Harris vs. Atlantic Richfield Co., supra, 14 Cal.App.4th at p. 77.)

The first of the three exceptions is

the independent tort exception where the defendant's conduct constitutes a tort as well as a breach of the contract. An example of this is where one party commits a fraud during the contract formation or performance. Job has not alleged any facts which would fall under this exception.

The second exception is the tortious breach of the implied covenant of good faith and fair dealing when there is a special relationship. (Id. at p. 78.) As previously set forth, Judge Dibiaso, as well as Judge O'Neill, ruled against such a cause of action here, and Job has not appealed that portion of the judgment.

The third exception is the bad-faith denial of a contract. (Harris vs. Atlantic Richfield Co., supra, 14 Cal.App.4th at p. 79.) No facts are

presented here for this exception to apply.

Job also relies on Sumitomo, supra 70 Cal.2d 81 as creating a duty outside of the contract. Sumitomo set forth the following rule:

> "[E]ach time the creditor accepts the continuing offer of a surety on a continuing guaranty by extending further credit to the principal debtor, the creditor owes a duty to the surety to disclose facts known by the creditor if the creditor has reason to believe that those facts martially increase the risk beyond that which the surety intended to assume and that those facts are unknown to the surety." (Id. at p. 84.)

The Sumitomo court began with the premise that "[i]n all suretyship relations, the creditor owes to the surety a duty of continuous good faith and fair dealing." (Id. at p. 85.) Thus the Sumitomo duty arises from the covenant of good faith and fair dealing. Judge Dibiaso previously ruled that Job

had no tort cause of action for the covenant of good faith and fair dealing. Job has not contested this ruling. Furthermore, the continuing guaranty stated that:

> "Guarantors have established adequate means of obtaining from Borrowers on a continuing basis financial and other information pertaining to Borrowers' financial condition. Guarantors agree to keep adequately informed from such means of any facts, events or circumstances which might in any way affect Guarantors' risks hereunder. With respect to information or material acquired in the normal course of Ban's relationship with Borrowers, Guarantors agree that Bank shall have no obligation to disclose such information or material to Guarantors."

Job waived the Sumitomo duty of subsequent disclosure and has not averred that the bank obtained information other than that in the normal course of Wells Fargo's relationship with J/W. Also, Job agreed that Wells Fargo could at any time

without notice change the terms of the indebtedness. The term "indebtedness" was explicitly used in the continuing guaranty in its "most comprehensive sense." Such a provision was held valid in Stevenson vs. Oceanic Bank (1990) 223 Cal.App.3d 306, 317.

Job argues in his reply brief that Sumitomo duties can arise precontract and thus from the basis for tort causes of action. Job's first two causes of action allege negligence based on postcontract actions by the bank. Similarly, his third cause of action, for breach of the implied covenant of good faith and fair dealing, alleges postcontract actions. Job did not argue precontract duty to the trial court during the hearing on this in limine motion. Having failed to arise the issue at the proper time below, he cannot now argue it here.

The trial court properly granted Wells Fargo's third motion in limine removing all of Job's tort causes of action.

3. Did the trial court err in granting Wells Fargo's fifth motion in limine for an order directing Job not to assert that the continuing guaranty and the third party pledge agreement were ineffective or unenforceable?

Wells Fargo's fifth motion in limine was for an order directing Job not to assert that the continuing guaranty and the third party pledge agreement were ineffective or unenforceable. In its moving papers, Wells Fargo argued that Job failed to plead adhesion and unconscionability and thus he was precluded from arguing these claims. In addition, Wells Fargo argued that even if properly pleaded, the provisions are not

adhesive or unconscionable.

In his written opposition to the motion, Job asserted that Wells Fargo was precluded from arguing the enforceability of the pledge agreement based on Judge Dibiaso's summary judgment ruling that there was a question of fact whether "[¶] A. Wells Fargo had no duty to investigate and verify the factual and financial information provided to it by Jay Williams prior to approving the line of credit to J/W Cattle; and [¶] B. Wells Fargo had no duty under Sumitomo to disclose to Job and facts Job now contends it should have disclosed." Job did not argue the above points to the trial court nor does Job argue these points in his brief now while addressing the fifth motion in limine. Our rejection of this point thus requires no further discussion.

During oral presentation of the fifth motion in limine counsel for Job admitted he had neither pled nor argued the guaranty was unenforceable. Thereupon, the court granted the motion precluding Job from arguing unenforceability, saying, "It doesn't appear as thought there's an issue on it."

Job asserts that court erred in ruling on Wells Fargo's fifth motion in limine. Job argues that although Wells Fargo requested broad relief, its arguments were directed to unconscionability and adhesion. Job therefore, contends that the relief granted should be restricted to the arguments of unconscionability and adhesion. Job complains the court's ruling was imprecise and unclear and "if it was to eliminate all assertions of

unenforceability" then the ruling was error. Job then argues if the trial court was only ruling on unenforceability based on adhesion and unconscionability, "then that is an entirely different matter, with different preclusionary effects." The remainder of Job's argument focuses on adhesion and unconscionability which we have discussed in detail previously.

This line of argument fails for a number of reason. First, it is unintelligible. Second, although Job makes vague references to negligence as demonstrating unenforceability, such an imprecise argument fails to show how Job was prejudiced if he was precluded from arguing unenforceability. Also, Job was allowed to proceed with his cause of action on exoneration, which in essence is a showing of unenforceability of the

continuing guaranty. Finally Job agreed and stated to the trial court that he had not argued or pled unenforceability. Job did not contest the trial court's statement that there doesn't appear to be an issue as to the fifth motion in limine.

The trial court did not err in granting the fifth motion in limine.

4. Did the trial court err in granting Wells Fargo's sixth motion in limine to exclude Job's assertions that Wells Fargo should have investigated J.W. prior to making the loan?

Wells Fargo's sixth motion in limine was to prohibit Job from arguing or presenting evidence: (1) about Job's expectation at the time the loan was made to J/W, (2) that Wells Fargo had a duty to investigate J/W, and (3) that Wells Fargo should have refrained from making

the loan. Wells Fargo argued that the motion should be granted based on Job's failure to plead the allegations and in any event should be granted based on the merits.

Job's written response claimed only that Judge Dibiaso had already ruled on the issues when he found there was a triable issue in fact whether Wells Fargo had a duty to investigate and verify the information provided to it prior to approving the J/W line of credit and had already ruled that there was a question of fact whether under Sumitomo Wells Fargo had a duty to disclose facts to Job.

The trial court began its discussion by quoting from Sumitomo:

> "This rule places no undue burden on the creditor because it does not require the creditor 'to investigate for the surety's benefit. . . [or] to take any unusual steps to

> assure himself that the surety is acquainted with facts which he may assume are known to both to the.'" (Sumitomo, supra, 70 Cal.2d at p. 91.)

The court questions Job whether it was his position that Wells Fargo had a duty to investigate. Job replied yes, and the court asked for his authority. Job stated that he was arguing Sumitomo and that Wells Fargo had a duty to disclose information to Job. In particular, Job argued the instance where Wells Fargo knew prior to the signing of the agreement that the Bank of America cattle count was actually 1,342 head of steer and not 2,003. The trial court then questioned whether that was an area of disclosure and not investigation. Wells Fargo clarified that its motion was directed only to an investigation duty. Job then argued that during the loan Wells Fargo should have investigated.

His authority for this was Wells Fargo argued that the guaranty establishes the duty, not the standard operating manual. The trial court again questioned Job whether there was a duty to investigate. Job again referred to Sumitomo and said there was a duty if there is a material change in the circumstances surrounding the loan and Wells Fargo did not go out and look at the cattle. The trial court then questioned Job whether he had pleaded this. Job said yes, in paragraphs 15 and 16 of the complaint.[12]

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12 Paragraphs 15 and 16 of the complaint provide:

"15. Plaintiff is informed and believes and on said information and belief alleges that Bank as creditor owed plaintiff as surety and duty to disclose to plaintiff that the risk being assumed by plaintiff was other than what the plaintiff reasonably expected and intended to assume.

"16. Plaintiff is informed and believes and on said information and belief alleges that on or about November 1982, Bank became aware of facts, or reasonably should have become aware of facts unknown to plaintiff, which

The trial court ruled as follows:

> "I think paragraphs fifteen and sixteen go to the issue of disclosure which is what you were originally arguing, and I agree with the argument as to the disclosure, but as to the duty to investigate it appears from as a matter of law there is no such duty. The motion is granted."

On appeal, Job argues he is left to wonder about the scope and effect of the trial court's ruling since what Wells Fargo sought appears broader than what the trial court granted.

Job relies on the following quotation from Sumitomo: The "creditor must not misrepresent or conceal facts so as to induce or permit the surety to enter or continue in the relationship in reliance on a false impression as to the nature of the risk." (Sumitomo, supra,

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Bank knew or reasonably should have known were unknown to plaintiff and which could and did materially alter his position as surety for J/W's obligation to Bank."

70 Cal.2d at p. 85.)

Based on the above quote, Job now argues, for the first time, the duty a creditor owes a surety is "inextricably linked to the surety's sate of mind." Thus Job contends that his perception that Wells Fargo would investigate was relevant on the issue whether Wells Fargo would investigate was relevant on the issue whether Wells Fargo breached its Sumitomo duty and the trial court erred in ruling this evidence inadmissible.

The Sumitomo duty is one of disclosure. (Sumitomo, supra, 70 Cal.2d at p. 84.) If Wells Fargo had agreed to investigate (although it had no legal duty to do so) and then did not, it would then have a duty to disclose this to the surety. Job never argued such a scenario; in any event the trial court explicitly stated that the duty to

disclose remained.

Finally, Job argues there can be a duty for a bank not to make a loan. Job claims this duty arises from the Sumitomo duty that a guarantor not be allowed to enter into a guaranty where the creditor knows that the guarantor has a false impression of the risk assumed.[13]

Again, Job never made this argument during Wells Fargo's sixth motion in limine and has waived it.

Banks owe no duty to borrowers in approving their loan and "Liability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender' [citations]. Normal supervision of the enterprise by

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13 [13]We note that as 50 percent owner of J/W shares, Job himself signed the financial statement submitted to the bank by J/W.

the lender for the protection of its security interest in loan collateral is not 'active participation'" (Wagner vs. Benson (1980) 101 Cal.App.3d 27, 35.) The Sumitomo duty from creditor to guarantor is not a duty to not make a loan, and Job has not shown why a bank should owe a greater duty to a guarantor rather than a borrower. The trial court did not foreclose Sumitomo duties of disclosure when it ruled on this sixth motion in limine.

5. Did the trial court err in ruling on Wells Fargo's seventh motion in limine to preclude evidence on certain duties Job claimed Wells Fargo owed him?

Wells Fargo's seventh motion in limine was to preclude Job from arguing or introducing evidence of what Wells Fargo was or was not doing, what Job though Wells Fargo was doing, and what

Wells Fargo should have disclosed it was doing or not doing in the eight following areas.

"(a Inventorying cattle purchased during the court of the loan;

"(b Abiding by any internal Bank procedure to inventory cattle;

"(c Substituting a more reliable methodology for advancing proceeds and verifying the cattle purchases than provided for in the contract documents;

"(d Monitoring or supervising the J/W Cattle, Inc. loan and Williams' cattle purchases in accordance with standard or sound banking procedure or otherwise;

"(e Pulling credit line when it strayed out of margin;

"(f Ceasing lending when anticipated payments on the line were not forthcoming;

"(g Monitoring performance of a Bank loan officer;

"(h Making statements regarding the performance of Bank personnel in extending or administering the loan."

In its moving papers, Wells Fargo's first basis for excluding the evidence was that Job never pleaded these

subjects. Next, Wells Fargo argued that in light of the parties' contract, none of the duties existed as a matter of law. Wells Fargo asserted that there could be no implied contractual duties which were inconsistent with the express terms of the contract. Wells Fargo contended that the collateral waiver provisions of the continuing guaranty, Job's agreement to keep himself informed, the waiver of Wells Fargo's duty to disclose clause and the waiver of defenses available provision, and the authorization given to Wells Fargo to change the terms of the indebtedness, resulted in a waiver of the above described duties, if such duties were in fact owing absent and agreements.

Job's written response was brief and incorporated by reference his opposition to Wells Fargo's first, second and third

in limine motions and relied on the summary judgment rulings by Judge Dibiaso and Judge Thaxter. Job also argued the covenant of good faith and fair dealing required the imposition of the duties.[14]

During argument before the trial court, the court asked whether Wells Fargo was obligated to do more than provided for in the contracts. Job replied that he had the right to anticipate that the bank would act like a bank. When asked which document provided for the duties, Job replied that the bank's standard operating manual set forth the bank's responsibilities. Job's authority for his proposition was again the Sumitomo case. The trial court granted the motion.

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[14] Job does not argue on appeal that the ruling was at variance with Judge Dibiaso's summary judgment motion rulings. Thus, no discussion is necessary on this point.

Job now asserts that the trial court erred in granting Wells Fargo's seventh in limine motion. First Job's argues that if the trial court erred in ruling on Wells Fargo's third motion in limine (to exclude all tort causes of action), then it was error to grant the seventh motion in limine without considering whether the evidence was admissible as evidence of the tort. As discussed previously, the trial court correctly ruled on the third motion in limine and properly eliminated Job's tort causes of action.[15]

Job next argues that implied in every contract is a covenant of good faith and fair dealing and that Job expected Wells Fargo to monitor and

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[15] Job does not mention or argue why he should be allowed to argue duties he now alleges when he failed to plead such duties. On this basis alone, Job loses.

supervise the loans and to disburse the funds to J/W according to an agreed-upon formula. Job criticizes the trial court's ruling as too narrow, contending that the trial court focused only on if the contract documents imposed such a duty without evaluating the implied covenant of good faith and fair dealing.

Job did not orally argue the implied covenant of good faith and fair dealing when the trial court asked for his argument on the seventh motion in limine and therefore he has waived the argument.[16] Furthermore, Wells Fargo did

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16 16 When the trial court ruled on Wells Fargo's motions, it had read Wells Fargo's written motions but had not read Job's opposition because it had just been filed. The trial court suggested to Job that he could easily orally argue what was contained in his written opposition. Job agreed to this procedure, and therefore his failure to orally argue a point resulted in a point not being raised to the trial court.

argue against the implied covenant of good faith and fair dealing in its moving paper; thus the trial court was aware of the argument. Also, it can reasonably be assumed that when the trial court stated that there were no duties "as a matter of contract implied or expressed or anything else," the trial court was considering the implied duties from the covenant of good faith and fair dealing.

Then next series of arguments by Job to Wells Fargo's seventh motion in limine involved whether the waivers and the continuing guaranty can release Wells Fargo from duties implied by the covenant of good faith and fair dealing.

> "The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, granted the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith

> and fair dealing. . . . [¶] This is in accord with the general principle that, in interpreting a contract "an implication . . . should not be made when the contrary is indicated in clear and express words." 3 Corbin, Contract, § 564 p. 298 (1960). . . . [¶] As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. And if defendants were given the right to do what they did by the express provisions of the contract there can be no breach.'" (Carma Developers (Cal.), Inc. vs. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 374.)

Job asserts that his waiver of any right to the collateral during the life of the loan is "irrelevant" to whether Wells Fargo's failure to "inventory the cattle . . . was a breach of the contractual covenant of good faith and fair dealing." He makes the same argument regarding his assertion that Wells Fargo owed him a duty to disclose

that it was not inventorying the collateral.

IN American Security Bank vs. Clarno (1984) 151 Cal.App.3d 874, the guarantors guaranteed a loan to a corporation and a loan to a subsidiary of the corporation. The guarantors were seeking partial exoneration based on the creditor's failure to perfect the security interest in the assets of the subsidiary. One of the guarantors' theories was that the bank's failure to perfect that security was a violation of the duty of continuous good faith and fair dealing. The appellate court disagreed with the guarantors, first finding that the bank did not fail to disclose any facts and further finding no authority to hold that the duty of good faith and fair dealing "requires the lender of a corporation to perfect security in its subsidiary absent

an express agreement to do so." (Id. at p. 883.) Furthermore, the appellate court found that the guarantors waived their right to the security. The appellate court relied on Joe Heaston Tractor & Imp. Co. vs. Securities Accept. Corp. (10th Cir. 1957) 243 F.2d 196. In Joe Heaston:

> "[T]he surety unconditionally guaranteed payments on all account. The creditor made the loans, took back cattle mortgages, but failed to perfect the liens. When the surety argued this failure released the guarantee, the court responded, '[t]he contract of guarantee makes reference to secured loans but it does not specifically require the taking of mortgages or that the same, if taken, be recorded.' [Citations.] The unconditional guarantee in Joe Heaston Tractor included the following language: '"The undersigned grantees to the Finance Company full power to modify or change terms of any of the Liabilities, to agree to forbearance with respect thereto, to consent to the substitutions or exchange or release of collateral thereto,

> and extension of time of payment of the Liabilities."' [Citation.]" (American Security Bank vs. Clarno, supra. 151 Cal.App.3d pp. 882-883.)

The waiver in the Clarno guaranty granted the lender "'full . . . to deal in any manner with the Liabilities and the collateral . . . [including the power] to consent to the substitution, exchange, or release . . . of the collateral. . . . '" (151 Cal.App.3d at p. 883, brackets in original.) The appellate court found that in light of the waivers, the sureties should not be release.

Here, Job agreed to "waive any benefit of, or any right to participate in any security whatsoever now or hereafter held by Bank." In addition, Job gave the bank the right, without notice, to "take and hold security for the payment of this Guaranty of the

Indebtedness guaranteed, and exchange, enforce, waive and release any such security." Finally, Job agreed to "keep adequately informed from such means of any facts, events or circumstances which might in any way affect Guarantors' risks hereunder."

The express provisions of the contract gave Wells Fargo the right to deal with the collateral as Wells Fargo saw fit and expressly provided that Job had no predictable interest in the collateral. Furthermore, Job agreed to keep informed of circumstances which might affect his risk. From these express terms, it is clear the bargain struck between the parties and the legitimate expectation of the parties were that Job would have no protectable right in the collateral. With no protectable right in the collateral,

there could be no implied conditions which require Wells Fargo to do things which would protect the collateral. Such an implied condition would be at variance with the express terms of the contract. In light of these provisions, Wells Fargo had no duty to inventory the cattle or disclose to Job that it was not inventorying the cattle.[17]

Next, Job argues that the terms of the agreement did not relieve Wells Fargo of all obligations to monitor or supervise the J/W line of credit nor did it relieve Wells Fargo of a duty to establish a methodology to verify

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17 Job argues that if this position is true, then Wells Fargo could have inventoried the cattle, found none, and still advanced funds on the line of credit, thus participating in a fraud without liability. Job did not file a cause of action for fraud, nor were there facts presented to support such a cause of action.

purchases.

As previously set forth, Job had no protectable interest in the collateral; thus he could have no expectations regarding purchases or their verification. Job has not pointed to anything which required Wells Fargo to monitor or supervise the business. The continuing guaranty explicitly placed on Job the duty to be appraised of all facts which might affect his risk. Furthermore, the continuing guaranty expressly provided that Wells Fargo had no obligation to disclose to Job information it obtained in the normal course of the bank's relationship with J/W. Requiring Wells Fargo to monitor the business, when Job expressly agreed to do so, would be in direct contradiction of the duties the parties agreed to in writing. This, in

combination with Job's lack of protectable interest in the collateral and the no-disclosure provision, clearly show that the parties intended for Job to be responsible for keeping track of J/W and shifted the burden of monitoring and supervision of the loan to Job. Job signed the guaranty and is bound by its express provisions. His failure to challenge the provisions at the outset, much less read them, was his initial mistake. He has failed to show that he should be relieved of the duties he agreed to undertake. His undertaking of duties and waiver of rights relieved Wells Fargo of many duties; these were the terms of the bargain struck by the parties. This court cannot imply duties contrary to those terms and contrary to the nature of the bargain struck between the parties.

Job's next argument is that the trial court erred in finding that Wells Fargo had no duty to pull the J/W line of credit if it strayed out of margin or if payments were no properly received. Job argues that the trial court also erred in finding that Wells Fargo had no duty to disclose such information to Job.[18]

In the credit agreement between Wells Fargo and J/W, the bank retained the right to decline to honor drafts presented by J/W if the draft would place the credit line out of margin (a specified ratio of loaned money to inventory. The continuing guaranty between Wells Fargo and Job gave the bank the right, without notice, to "change the terms of the Indebtedness or any part thereof." The continuing guaranty also

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18 [18] This argument was not pleaded and, as with previous arguments, fails for this reason alone.

provided that "the work 'Indebtedness' is used herein in its most comprehensive sense." In addition, the continuing guaranty stated that Job waived any defenses arising by reason of "any disability or other defense of Borrowers."

Relying again on Judge Thaxter's summary judgment ruling and Commercial Standard Ins. Co. vs. Bank of America, supra, 57 Cal.App..3d 241, Job argues that since Wells Fargo agreed to disburse the loan funds buy a particular procedure, then Job as a surety could maintain a cause of action against Wells Fargo, the creditor, for having failed to comply with the procedure. As we previously set forth, Judge Thaxter's reliance on Commercial Standard was not on this point, and Commercial Standard has no application here, because in

Commercial Standard there was no contract between the creditor and the surety.

Next, Job contends the trial court erroneously found Wells Fargo did not have a duty to disclose to him that it was not following the procedures for loan disbursements set forth in the credit agreement--for example, that the loan was out of margin. Job argues that Wells Fargo's right to change the terms of the indebtedness is different from changing the terms of the loan agreement. Job first lists the definition of indebtedness as used in the continuing guaranty:

> "The work 'Indebtedness' is used herein in its most comprehensive sense and includes any and all advances, debts, obligations and liabilities of Borrowers, or any of them, heretofore, now or hereafter made, incurred or created, whether voluntary or involuntary and however arising, whether due or not due, absolute or contingent,

liquidated or unliquidated, determined or undetermined, and whether Borrowers may be liable individually or jointly, or whether recover upon such indebtedness may be or hereafter become unenforceable."

He then makes the following argument:

"The definition is long-winded, but essentially equates to the common conception of the term, as set forth in Black's Law Dictionary (4th Ed., 1951), as 'The state of being in debt, ...' and, of course, C.C.§ 1644 mandates that words of a contract be understood in their ordinary and popular sense. The terms of the indebtedness thus govern the state of being in debt, but in no way affect how the debt was created, which is the function of the terms of the credit agreement. The guaranty itself gives ample indication of this common sense reading of the terms, as it specifies renewal, extension, acceleration and the rate of interest charged on the existing debt as illustrations of what is meant by the 'terms of the indebtedness.' Under the principle of ejusdem generis, when general words follow a list of specific terms, the general terms will be strictly limited in meaning to the specific words. 14

Cal.Jur., supra at § 167. Wells Fargo thus cannot here claim the 'terms of indebtedness' has a broader meaning than that indicated by the specific examples."

Job's argument is at the most confusing. Job tries to equate the work "indebtedness" as used in the continuing guaranty with the phrase "terms of the indebtedness" used in the continuing guaranty. The indebtedness is the state of being in debt, and Wells Fargo had the right to change the "terms" of that debt. One of the terms of the indebtedness was that Wells Fargo would only loan within certain margins.

In Stevens vs. Oceanic Bank, supra, 223 Cal.App.3d 306, Stevenson was a partner with Tullman in Bahia Enterprise Incorporated. Oceanic agreed to give Bahia a conditional line of credit. One of the conditions was that Stevenson would execute a continuing guaranty.

Condition "g" of the credit agreement was that "each letter of credit application was to be accompanied by either a purchase order or a bank-to-bank letter of credit." (Id. at p. 310.) Stevenson then entered into the continuing guaranty, which contained a provision very similar to the provision here, allowing Oceanic to change the terms of the indebtedness. Oceanic issued founds without complying with condition "g" of the credit agreement with Bahia. (Id. at pp. 310-312.) Because the credit agreement was strictly with the corporation, Bahia, the appellate court ruled that Stevenson was limited to his contract with Oceanic, the continuing guaranty. The appellate court found that Stevenson could not base a cause of action on contention "g" of the credit application because such an incorporation

would "'flatly contradict' the express terms of the guaranty agreement." (Id. at pp. 317-318.) Oceanic could thus waive condition "g" of the credit agreement without the approval of Stevenson, the guarantor.

Job is attempting now to do here that which was disallowed in Stevenson. The credit agreement here was strictly an agreement between Wells Fargo and J/W, a corporation. Job could not base a personal contract claim on the credit agreement. His personal claim had to be brought under his continuing guaranty. The continuing guaranty did not incorporate the terms of the credit agreement but in fact expressly alleged that Wells Fargo could change the terms of the credit agreement without notice to Job. Job has no basis to claim that Wells Fargo's failure to comply with the

credit agreement breached a duty to Job when the continuing guaranty expressly allowed Wells Fargo to make the changes that it made, without notice to Job.

Wells Fargo's final area of preclusion in the seventh motion in limine was one to preclude references to internal performance of Wells Fargo.

On appeal Job summarizes Wells Fargo's argument and then makes his own argument.[19] His argument is as follows:

> "Wells Fargo's final argument tin its seventh motion in limine seeks preclusion of references to internal performance of Wells Fargo in regard to the J/W Cattle line of credit. (C.T. p. 4380.) Wells Fargo opines that such evidence could only be prejudicial, without probative value, unless it was connected to a duty Wells Fargo owed to

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[19] Job mentions the dual authorization requirement as part of this argument. The dual authorization requirement was not a part of Wells Fargo's seventh motion in limine and is irrelevant here.

Job, not a duty a Wells Fargo employee owed to Wells Fargo. The motion's request on this issue is particularly broad in seeking preclusion of all evidence of Wells Fargo's 'internal performance,' but is predicated on the assumption the [sic] Wells Fargo owed no duty to the [sic] Job and thus succeeds or fails with that argument, which has been fully discussed in other sections of this Brief.

"Job here only notes that the analysis is probably correct that evidence of internal performance by Wells Fargo employees in connection with the J/W Cattle line of credit would be probative only if it evidenced Wells Fargo's breach of a duty to Job, but most of Wells Fargo's actions that breached its duties to Job, of necessity, involved internal performance. To decide whether evidence of such actions was admissible for this purpose, it seems obvious that it would have been necessary to consider separately what each action was, yet the court made no such analysis. In granting the motion, however, the court had precluded analysis of the facts by the jury, that was to be the trier of fact, which was clearly error."

Assuming for the sake of argument

that the internal performance of Wells Fargo's employees was admissible at all, Job does not identify here what duty Wells Fargo owed him and breached such that the internal performance of Wells Fargo was relevant. Without such an identification of the duty, this argument is meritless. The trial court properly granted Wells Fargo's seventh motion in limine.

6. Did the trial court err in granting Wells Fargo's eighth motion in limine to exclude evidence on Wells Fargo's failure to mitigate damages?

As an affirmative defense to Wells Fargo's cross-complaint, Job asserted that the bank should be barred or limited in its recover against Job because Wells Fargo failed to mitigate damages. Wells Fargo's eighth motion in limine was to exclude Job's evidence that Wells Fargo

failed to mitigate damages. Wells Fargo argued that the sales were approved by Job and were sales by J/W. Wells Fargo asserted that Job was estopped from asserting a failure to mitigate because he consented to the sale and without such consent Wells Fargo would not have release its security interest in the cattle. Furthermore, Wells Fargo contended that Job's consent waived his right to contest the sale or allege a failure to mitigate damages. Finally, Wells Fargo argued that any mitigation theory would have to be based on the sale by Wells Fargo and not a sale by Job or J/W.

Assuming only for the sake of argument that the sale was conducted by Wells Fargo, Job's theory is not relevant. Job's theory, as asserted by Wells Fargo, was that the cattle should

have been held over and sold later for a greater recovery. Because of Wells Fargo's position as a secured creditor, it asserts it had the right to sell the cattle upon J/W's default, free of any duty to retain them.

Job's written opposition to Wells Fargo's motion argued that Wells Fargo had no concern regarding mitigation of damages because Wells Fargo looked to Job as a "deep pocket" for recover. Job asserts that Wells Fargo should have sold the cattle at a proper time to receive a better price. Since Wells Fargo cause the loss (before sale), argues Job, it should be liable for failing to minimize such loss.

When Wells Fargo's eighty motion in limine was first brought up to the trial court, Job asserted that there was a

question whether the cattle sales[20] were approved by Job. The trial court said if there was no approval, then Wells Fargo was obliged to follow the Uniform Commercial Code. Job agreed. When the trial court asked Job what his position was he asked that the motion be deferred until Job could present a new case. The trial court agreed to defer the motion.

When the motion was heard, Job presented his new case, In re Kirkland (9th Cir. 1990) 915 F.2d 1236.

Job argued that under Kirkland, Wells Fargo had to show compliance with the notice requirements of the Uniform Commercial Code before obtaining a default against a debtor. The following discussing then occurred:

"THE COURT: Isn't the issue here

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20 20There were two separate sales of cattle--one in January 1984 and one in February 1984.

the affirmative defense of failure to mitigate?

"MR. ALBERTINI: [Job's counsel: Yes.

"THE COURT: How does that argument fit into a duty to mitigate?

"MR. ALBERTINI: One of the things that they -- they did at the time that they sold the cattle, which all related to the fact that if they had left the cattle a loan just to eat, because most of the pasture payments were paid for, the two people that ultimately bought the cattle in the State of Washington off of the Gill Ranch made a substantial amount of money, in excess of five hundred thousand dollars, and all they did was buy the cattle and let the cattle just eat out, because it was sold at the worst time.

"THE COURT: Isn't that argument in contradiction to U.C.C. 9507?

"MR. ALBERTINI: Not if they didn't give the adequate notice requirements it's not.

"THE COURT: Who's? Mr. Wooster?

"MR. WOOSTER [Wells Fargo's counsel]: I'll speak to that. "If the court please, we have located that we believe to be a copy of the case Mr. Albertini is referring to. We'd be happy to give the Court a copy.

"THE COURT: Thank you.

"MR. WOOSTER: It's Kirkland versus Security Pacific National Bank.

"May I approach the bench?

". . . . . .

"THE COURT: All right. Go ahead.

"MR. WOOSTER: Well, this case holds that a guarantor is considered to be a debtor for purposes of the notice requirement on sale of collateral under the U.C.C.

"THE COURT: That's no surprise.

"MR. WOOSTER: That's no surprise, but it has nothing to do with the duty to mitigate which is pleaded.

"THE COURT: Well, that's why I asked the question, how does this argument address the issue of duty to mitigate?

"MR. WOOSTER: We don't see how it does, number one. And, number two, there's no affirmative defense in the answer until there was a failure to give notice on the sale of the collateral. SO even if this case had something to do with the facts of our case, which it doesn't, any defense that Mr. Job might have by reason of a failure to give any notice of the U.C.C. as was done in the Kirkland case has been waived.

"The last thin I say is we have the documents before the Court in which Mr. Albertini wrote to Wells Fargo Bank on behalf of his client consenting to the

cattle sale, and his client signed the sale contract twice on the Gill cattle.

"THE COURT: I don't think we even need to get into that.

"Anything further?

"All right. The emotion number -- Defense motion number eight on the -- to exclude evidence that the Defendant failed to mitigate is granted."

Job now argues that the trial court erred in ruling on Wells Fargo's eighth motion in limine. First Job argues that Wells Fargo's consent-and-waiver arguments were questions of fact which should not have been the subject of a motion in limine. Job faults the trial court's vagueness as raising a question as to what the court was ruling on.

As evidenced by the prior quotation, the trial court did not think it was necessary to consider the consent arguments in its rulings. Thus this court can assume that the trial court did not make purported unauthorized factual

determinations regarding consent and waiver; the trial court did not consider the argument at all.

Job next argues that if the trial court's ruling on the eighth motion in limine is considered in the narrow sense and did not encompass the consent-and-waiver arguments (and the related issues of notice and commercial reasonableness), then Wells Fargo's failure to affirmatively prove notice under Commercial Code section 9504 results in the trial court judgment at trial being in error.

Pursuant to California Uniform Commercial Code section 9504:

> "[A]fter default, a secured party may sell, lease, or otherwise dispose of any or all of the collateral securing the indebtedness. Following the disposition of the collateral, the debtor is liable for any deficiency. [Citation.] Section 9504 requires that notice of the disposition of

> the collateral be given to the debtor, and that any such disposition be conducted in a commercially reasonable manner. [Citation.] A commercially reasonable disposition is presumed to be in good faith and at the greatest possible market rate. [Citation.] The requirements of section 9504 are strictly construed. 'If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment.' [Citation.] Failure to comply with either the notice requirement or the requirement of commercial reasonableness will act as an absolute bar to a deficiency judgment." (Canadian Commercial Bank vs. Ascher Findley Co. (1991) 229 Cal.App.3d 1139, 1149, fn. omitted.)

While Job waived compliance with Commercial Code section 9504 in his continuing guaranty, we will assume for sake of this discussion that a guarantor is a debtor entitled to the predictions of Commercial Code section 9504 and cannot waive the right to this section's notice of sale of collateral prior to

default. (See American National Bank vs. Perma-Title Roof Co. (1988) 200 Cal.App.3d 889.)

Job's argument now is that Wells Fargo's failure to show compliance with Commercial Code section 9504 results in the judgment below being erroneous.

> "The secured party who conducts a sale of collateral must allege and prove compliance with the requirements of section 9504 to recover a deficiency judgment. [Citation.] This court has held that the failure to properly plead compliance with section 9504 does not compel reversal of a judgment for the secured party where there was sufficient evidence at trial to establish that notice was proper and that the sale was made in a commercially reasonable manner. The effect of our holding is that the failure to plead compliance with section 9504 was harmless where the elements necessary to obtain judgment were proved at trial anyway. [Citation.]" (American National Bank vs. Perma-Title Roof Co., supra, 200 Cal.App.3d at pp. 895-896.)

Wells Fargo asserted in its eighth

motion in limine and again on appeal that Commercial Code section 9504's notice provisions did not apply because the sale was conducted by J/W and not by Wells Fargo. Nothing in the record shows that the trial court ever considered this argument during the hearing on the eighth motion in limine. "[T]he provisions of California Uniform Commercial Code section 9504, pertain solely to sales of collateral by a secured creditor, not a debtor." (Krueger vs. Bank of America (1983) 145 Cal.App.3d, 204,214.)

Even if the secured creditor must provide notice to the guarantor when a debtor sells his property, the lack of notice will not relieve the debtor of liability under the guaranty when the continuing guaranty contains a clause giving consent to modifications of the loan obligations. (Krueger vs. Bank of

America, supra, 145 Cal.App.3d at pp. 214-215.) Job gave such consent here. Thus, if the sale of collateral was by J/W and not Wells Fargo, Wells Fargo had no duty to plead compliance with Commercial Code section 9504. Wells Fargo points to the sales agreements and other documents which list J/W as the seller.

Job has not argued on appeal nor shown in the record that following the eighth motion in limine the issue was ever brought up again. On the one hand, Wells Fargo had the burden to plead and prove compliance with Commercial Code section 9504 if it sold the collateral after default. On the other hand, if Wells Fargo did not sell the collateral, then compliance with Commercial Code section 9504 was not an issue. Because the issue was not resolved as part of the

eighth motion in limine, Job had a duty to either show that Wells Fargo sold the cattle or to challenge in some way Wells Fargo's assertions of who sold the collateral. Without such an assertion, Wells Fargo had no obligation to plead and prove compliance with Commercial Code section 9504.

Job has not raised an issue on appeal to show that the trial court erred in granting the eighth motion in limine. The motion in limine, finding it irrelevant to the motion. Job failed to later bring forth the question of who sold the collateral and therefore waived it.

7. Did the trial court err in granting the ninth motion in limine to admit certain evidence?

Wells Fargo's ninth motion in limine was one to admit certain evidence. Job

challenges the trial court's ruling "that certain statements made in the context of a different action would be admissible at trial."

Because Job does not indicate that the evidence in question was ever introduced at trial, his argument clearly fails. Prejudice is not shown. "Appellants have the burden of showing a prejudicial effect on appeal." (Larmour vs. Campanale (1979) 96 Cal.App.3d 566, 570.)

8. Did the trial court err in its ruling on Wells Fargo's tenth motion in limine for judgment on the pleading?

Wells Fargo's tenth motion in limine was for judgment on the pleadings on the first five causes of action.[21] Wells Fargo claimed the first two causes of

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21 Job does not challenge on appeal the dismissal of the fourth and fifth causes of action.

action for negligence were eliminated by the in limine motion that eliminated duties outside the contract, and also eliminated because as a matter of law the parties were limited to their contractual relationship. Wells Fargo argued that the third cause of action, for breach of the covenant of good faith and fair dealing, was eliminated by Judge Dibiaso's ruling that Job was limited to only a contract action and the contract portion was eliminated by the holding precluding Job from arguing duties outside the contract.[22]

Job's written opposition argued that motions for summary judgment on these

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22 Wells Fargo also argued in its moving papers that Job's sixth cause of action for declaratory relief was inappropriate because these claims could be disposed of in the cross-complaint. The court denied the motion as to the sixth cause of action.

causes were previously denied; according to Job, Judge Thaxter and Judge Dibiaso had expressed that negligence and breach of the covenant of good faith and fair dealing were issues.

At the hearing, Job argued that in every contract there is a covenant of good faith and fair dealing and that remains in the lawsuit. Wells Fargo's position was that the terms of the agreement are inconsistent with Job's claim that drafts which contained unauthorized signatures were honored.

The trial court ruled that Job's concession that the first two causes of action were based on the covenant of good faith and fair dealing eliminated these causes of action because there is no duty outside the contract for this. The court granted the motion to the third cause of action based on in limine motion one

(unauthorized signatures on drafts) and in limine motion three (duties outside of the express contract not to be implied).

During the later motion for nonsuit, the trial court clarified its earlier ruling on the judgment on the pleadings and stated that although its earlier ruling was correct, the ruling should have been based on the continuing guaranty and Evidence Code section 622.

Job now contends that the trial court's rulings were incorrect. First Job argues the erroneous nature of the trial court's ruling as to the first two causes of action for negligence. HE does so based on the trial court's original ruling. He fails to discuss, much less mention, the correction ruling by the trial court. His argument based on he court's original statement is thus totally without merit.

In his reply brief Job asserts that Wells Fargo's precontract conduct, such as the failure to disclose the initial Bank of America cattle shortage, could have been the basis for a negligence cause of action under Sumitomo. However, raising this unpleaded theory now, for the first time, is to no avail.

Job also contends the trial court erred in granting judgment on the pleadings without leave to amend.

"A judgment on the pleadings functions like a demurrer in that it is an attack on the face of the pleading." (Anmaco, Inc., vs. Bohlken (1993) 13 Cal.App.4th 891, 900.)

> "The general rule is that allegations of a complaint are to be liberally construed with a view to substantive justice between the parties. [Citation.] AN order sustaining a demurrer without leave to amend will constitute an abuse of discretion if there is any reasonable possibility

that the defect can be cured by an amendment. This rule is liberally applied to permit further amendment not only where the defect is one of form but also where it is one of substance, provided the pleader did not have '"a fair prior opportunity to correct the substantive defect."' [Citations.]

"On the other hand, there is nothing in the general rule of liberal allowance of pleading amendment which 'requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.' [Citation.] The burden is on the plaintiffs to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of their pleadings." (Careau & Co. vs. Security Pacific Business Credit, Inc., supra. 222 Cap.App.3d at pp. 1387-1388.)

"'"If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint,

the court, or motion for judgment on the pleadings, should, on his application so to do, permit him to amend."'" (Tiffany vs. Sierra Sands Unified School Dist. (1980) 103 Cal.App.3d 218, 225-226.)

Although Job argues he should be given leave to amend, he does not specify in his opening brief how he would amend his pleadings so they would be sufficient. Job relies on Dobbins vs. Hardister (1966) 242 Cal.App.2d 787 as support for his argument that he should be granted leave to amend even absent a request to do so. In Dobbins the court relied on MacIsaac vs. Pozzo (1945) 26 Cal.2d 809 and stated:

> "With regard to defendant's failure to request leave to amend the answer, it should be noted that, pursuant to the provisions of section 472c, when a demurrer is sustained without leave to amend, the question of whether the trial court abused its discretion in making the order

> may be urged on appeal even though no request to amend has been made. [Citation.] In MacIsaac it was held that since the reason for the rule declared in section 472c is the same on a motion for judgment on the pleadings 'the same result should obtain.'" (Dobbins vs. Hardister, supra, 242 Cal.App.2d at pp. 797-798.)

MacIsaac vs. Pozzo, supra, 26 Cal.2d at pages 815 and 816 held:

> "'If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend.' The same rule applies to the defendants' pleadings; and when the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them. The granting of the motion without leave to amend would in many cases be an

> absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits."

Here, quire simply the grant of the motion for judgment on the pleadings was not without leave to amend, so Job has not shown how he suffered an actual denial of justice. Even, if we were to interpret the ruling differently, Job's argument fails.

The appellate court 'must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory." (Barquis vs. Merchants Collection Assn. (1972) 7 Cal.3d 94, 103.)

> "The standard of review on appeal from the granting of a judgment on the pleadings is the same as that on appeal from the sustaining of a demurrer. [Citations.] The properly pleaded material allegations in the declaratory relief cause of action in the amended cross-complaint must be accepted as

> true. [Citations.] In addition, the Supreme Court has held: '"[T]he allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties." [Citations.]'" (C.J.L. Construction, Inc. vs. Universal Plumbing (1993) 18 Cal.App.4th 376, 382-383.)

Nothing in the facts pleaded in the first two causes of action even hinted at a precontract failure by Wells Fargo to disclose information. This was not a case of something being pleaded imperfectly or defectively. It was a failure to plead facts giving rise to a cause of action on this basis at all.[23]

"Obvious reasons of fairness

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23 Paragraph 15 of the complaint generally alleges that Wells Fargo owed Job a duty to disclose that the risk assumed by Job was other than what he expected. This general allegation had absolutely no factual support in the remainder of the first and second causes of action that related to precontract activities.

militate against consideration of an issue raised initially in the reply brief." (People vs. King (1991) 1 Cal.App.4th 288, 297, fn. 12.) Job never really makes a point about precontract conduct until the reply brief; even then, he fails to tie his arguments and authorities together in a cohesive fashion to form a comprehensible argument. We see no reason to analyze the possible merits of the point.

Job contends the court erred in granting judgment on the pleadings as to his third cause of action. First, Job criticizes the manner in which the trial court ruled. The trial court eventually ruled that Wells Fargo's first and third motion in limine eliminated the third cause of action for a breach of the covenant of good faith and fair dealing.

Job argues that the procedures set

up by Wells Fargo which it did not follow were the bases for the breach. As set forth in our earlier discussion, the duties Job now asserts are in contradiction with the continuing guaranty and cannot form the basis for a breach of the covenant of good faith and fair dealing. Job has not asserted any new breached, not previously discussed, which might have formed the bases for such a cause of action.

The trial court properly granted judgment on the pleadings.

9. Did the trial court err in ruling on the twelfth motion in limine to exclude the testimony of Job's expert witness, William Sarsfield?

Job contends the trial court erred in granting this motion. His sole argument is that the trial court erred in eliminating his first three causes of

action, and if those causes of action had not been eliminated, then the expert's testimony would have been admissible.

Since the previous discussion shows that the first three causes of action were properly eliminated, Job's argument fails.

10. Did the trial court err in denying Job's motion for reconsideration?

After the rulings on the judgment on the pleadings, Job made a motion for written opinion. The trial court denied the motion, stating that Job would have a transcript that day. Job reserved that motion. Job then made a motion to recess so he could review the transcript and then make a motion for reconsideration. The trial court, asked if Job was making a motion at this time. Job said no, that he was making a motion to recess so he could make the motion after he got the

record. A lengthy discussion followed on whether Job had new facts or law to present on the motion. At one point, Job stated he was making a motion for reconsideration. The trial court again questioned Job if he had new facts or law that were not in existence at the time of the previous motion and indicated that if he did not he could be sanctioned. The trial court cautioned it did not want facts brought up that were available on the day of the previous motion because those facts had been waived. After further discussion, Job stated he would like the court to review his motion after he had the transcript to back up what he wanted to say. The court then ruled:

> "When you get the transcript if you wish to make a motion for reconsideration based on the strict compliance with 1008, and understanding the prerequisites for 1008, and understanding 1008 of the Code of Civil Procedure subdivision

(c) concerning contempt of court, you may do so."

Job now asserts that the trial court erred in denying his motion for reconsideration. Job argues that the court erred in stating that a motion for reconsideration must be based on new facts or law.

The argument fails. Although it is true that a Code of Civil Procedure section 1008 motion for reconsideration may be based upon new facts or a different state of facts (Careau & Co. vs. Security Business Credit, Inc., supra, 222 Cal.App.3d at pp. 1386-1387, fn. 9), the party who asserts different facts must produce a satisfactory explanation for the failure to produce the evidence at an earlier time (Blue Mountain Development Co. vs. Carville (1982) 132 Cal.App.3d 1005, 1013). Job did not do this, nor has he offered an

explanation on appeal

More importantly, Job never actually made a motion for reconsideration and therefore there is nothing for this court to review. Job does not assert on appeal that he was precluded by the trial court from making the motion.

11. Did the trial court err in dismissing Job's sixth cause of action with prejudice and applying the doctrine of retraxit?

Following the judgment on the pleadings, Job made his opening statement on the only remaining cause of action, the sixth cause of action for exoneration. This was followed by a motion for nonsuit by Wells Fargo on several points. the nonsuit motions was granted. Following this, Job was given the opportunity to reorganize to determine what was left of his case. Job

then asked to reserve his evidence until the defense side of the case. Wells Fargo objected. The trial court and Job then discussed what was left of Job's sixth cause of action. When Job brought up some^hing he though remained in the case, the trial court disagreed that the claims were relevant or viable in light of the previous motion in limine and motions for nonsuit.

Job then agreed that going forward with his sixth cause of action would be futile. Job made an offer of proof of what his evidence would have been. After Job completed his offer, the trial court told Job that his offer of proof contained only evidence that was not relevant based on the previous rulings; if Job did not like those rulings, he could appeal, but he had to proceed at trial within the confines of the rulings.

The trial court again asked Job for an offer of proof for the sixth cause of action. The attempt to make an offer of proof was repeated. The trial court then told Job to go forward with his sixth cause of action.

Job then stated, "That being the case then . . . without in any way prejudicing and preserving our rights for appeal we will then move to dismiss the complaint and not dismiss any of the defenses on the cross-complaint."

Wells Fargo then requested that the dismissal be with prejudice pursuant to Code of Civil Procedure section 581, subdivision (e). The trial court stated, "The motion--the request has been made, and under 581, subdivision (e) the request is granted with prejudice in that there is no consent that I've heard, nor is there--has there been any request, nor

showing of good cause for it to be without prejudice."

Code of Civil Procedure section 581, subdivision (e) provides:

> "(e) After the actual commencement of trial, the court shall dismiss the complaint, or any causes of action asserted in it, in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal, unless all affected parties to the trial consent to dismissal without prejudice or by order of the court dismissing the same without prejudice on a showing of good cause."

Wells Fargo then made a motion that, under Torrey Pines Bank vs. Superior Court (1989) 216 Cal.App.3d 813, the doctrine of retraxit should apply to preclude Job from arguing anything contained in his dismissed cause of action. The motion was granted.

Job contends that the trial court should have granted Wells Fargo's

previous motion to dismiss the sixth cause of action during the judgment on the pleadings since it was clear the trial court thought there was nothing left of this cause of action.

Quite simply the court did not grant the motion for judgment on the pleadings to the sixth cause of action. Job cannot complaint about something that the trial court did not do when it was not shown the trial court had some duty to act.

Job then argues that the court provided a clear message that there was nothing left to his complaint, so he moved to dismiss it, and preserve his defenses. Job implies his request to preserve his defenses should be interpreted as good cause for a request that the dismissal be without prejudice.

In Torrey Pines a guarantor filed an action against a bank. The bank brought

a separate action against the guarantor. The guarantor dismissed his action against the bank with prejudice. The bank then sought to preclude the guarantor from raising affirmative defenses to the bank's complaint which arose from the same operative facts and legal issues in the guarantor's dismissed complaint. The appellate court agreed with the bank's position.

> "'"A retraxit has always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently maintaining an action for the cause renounced." [Citation.]' A retraxit is equivalent to a judgment on the merits and as such bars further litigation on the same subject matter between the parties. [Citations.]
>
> "A dismissal with prejudice is the modern name for a common law retraxit. [Citation.] Dismissal with prejudice under section 581 'has the same effect as a common law retraxit and bars any future action on the same subject matter. [Citations.] Dismissal with prejudice is

determinative of the issues in the action and precludes the dismissing party from litigating those issues again. [Citations.] 'Relevant language providing for a plaintiff's voluntary dismissal with prejudice was introduced into section 581 to limit the plaintiff's leeway to abandon a case and then refile it. [Citations.] The statutory term "with prejudice" clearly means the plaintiff's right of action is terminated and may not be revived.' [Citation.]

"The dismissal with prejudice terminated [the guarantor's] action and affected the parties' rights. The dismissal with prejudice was a final judgment favoring the Bank. [Citations.] 'The bar raised by a dismissal with prejudice is equal, under the doctrine of res judicata, to the bar raised by a judgment on the merits.' [Citation.] Thus, [the guarantor's] dismissal with prejudice of his lawsuit in case number 597676 constituted a final judgment invoking the bar of res judicata. [Citation.]" (Torrey Pines Bank vs. Superior Court, supra, 216 Cal.App.3d at pp. 820-821.)

Job argues that retraxit should not be applied in this case.

As previously set forth, Job agreed that proceeding with the sixth cause of action was futile in light of the previous motions granted by the trial court. Thus Job admitted there was nothing left to his sixth cause of action. If there was nothing left in the sixth cause of action, then there was nothing to which res judicata or collateral estoppel would apply. Job has not shown nor argued that there was anything left to his sixth cause of action; therefore, he has utterly failed to show how retraxit could have precluded him from raising a defense to the cross-complaint. IF there was "nothing" left of the sixth cause of action, then Job could not be prejudiced by holding that he be precluded from raising "nothing." Job's failure to show how the rulings prejudicially affected him ends the

issue; there is no reason to review rulings for error when there is no effect shown.

III. Attorneys fees

Wells Fargo made a motion for costs, expenses and reasonable attorney fees. The trial court awarded Wells Fargo $212,841.86 in costs and $975,000 in attorney fees[23] for a total of $1,187,841.86.

Job asserts that "an award of close to one million dollars on its face seems excessive and further an unconscionable amount to impose upon a third party unable to control the amount of the attorneys' fees being incurred (as not the client." Job also contends the costs should have been disallowed in their entirety. Job's argument regarding costs

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23 Wells Fargo request $1.0 million in attorney fees.

is made by incorporating by reference his argument made below.

> "[I]n fixing the fees of attorneys, the court is vested with a wide discretion and the court's award of an amount for such fees will be disturbed only when it is manifest that there has been a palpable abuse of such discretion." (Los Angeles vs. Los Angeles-Inyo Farms Co. (1933) 134 Cal.App. 268, 274.)
>
> In awarding attorney fees, the trial court noted:
>
> "With regard to attorneys' fees requested, the Court has reviewed the entire file and points out the following:
>
> "1. There were 20 depositions taken (half multi-day depositions) (such as 11 days for the plaintiff, a couple of five-day depositions, 1 four-day out of state deposition, and 1 three-day deposition);
>
> "2. That there were approximately 200 drafts involved with the J.W. Cattle line of credit;
>
> "3. That there were more than 8,000 documents produced;
>
> "4. A total figure produced by both sides of litigation;

"5. That there were 10 pretrial motions;

"6. That there were six trial dates;

"7. That there were numerous and complex motions in limine."

We note the amount of attorney fees was dictated in large part by the manner in which Job prepared his case and went forward. Having reviewed the multiplicity of arguments made below and the voluminous record, we cannot say the award of attorney fees was an abuse of discretion.

Job's arguments regarding costs have been waived by the method he used to raise them on appeal. "'[A]n appellant must fully present all arguments in briefs rather than incorporate them by reference from papers filed below.'" (Aguimatang vs. California State Lottery (1991) 234 Cal.App.3d 769, 796.)

Wells Fargo seeks attorney fees and

costs on appeal. Job does not address this request in his reply brief. Attorney fees are awardable based on a contract. "'Although this court possesses the power to appraise the fix attorney fees on appeal, the better practice is to remand the cause to the trial court for the determination of such fees. [Citations.]'" (Chevron U.S.A., Inc. vs. Bragg Crane & Rigging Co. (1986) 180 Cal.App.3d 639, 648.)

DISPOSITION

The judgment is affirmed. The petition for writ of mandate is denied. Wells Fargo is awarded its reasonable costs and attorneys fees on appeal. The matter is remanded to the trial court for a determination of Wells Fargo's reasonable attorneys fees and costs incurred on appeal.

VARTABEDIAN, J.

WE CONCUR:

MARTIN, ACTING P.J.

BIANCHI, J.*[24]

24*Retired judge of the Kern County Superior Court, sitting under assignment by the Chairperson of the Judicial Council.